

2-27-2012

# City of Meridian v. Petra Inc. Clerk's Record v. 7 Dckt. 39006

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## Recommended Citation

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Date: 5/3/2010      PAYROLL HISTORY DISTRIBUTION      Report Code: 48.71  
 Time: 12:50:04 PM      Page: 1  
 Company No. 1 PETRA Incorporated  
 Printing: Employee Range COUTH0 thru COUTH0 Pay Periods Ending Between 08/01/06 and 04/30/09  
 Job Range 060675 thru 060675

Tom Coughlin

JOB	PHASE	COST CODE	PERIOD ENDING	EMPLOYEE CODE	REG HOURS
60675	1	410	12/13/2008	COUTH0	16
60675	1	410	12/20/2008	COUTH0	16
60675	1	410	12/27/2008	COUTH0	12
60675	1	410	1/3/2009	COUTH0	16
60675	1	410	1/10/2009	COUTH0	6
60675	1	410	1/17/2009	COUTH0	16
60675	1	410	1/24/2009	COUTH0	20
60675	1	410	1/31/2009	COUTH0	24
60675	1	410	2/7/2009	COUTH0	24
60675	1	410	2/14/2009	COUTH0	16
60675	1	410	2/21/2009	COUTH0	8
60675	1	410	2/28/2009	COUTH0	22
60675	1	410	3/7/2009	COUTH0	23
60675	1	410	3/14/2009	COUTH0	21
60675	1	410	3/21/2009	COUTH0	18
60675	1	410	3/28/2009	COUTH0	28
60675	1	410	4/4/2009	COUTH0	9
60675	1	410	4/11/2009	COUTH0	18
60675	1	410	4/18/2009	COUTH0	8
60675	1	410	4/25/2009	COUTH0	12
Total					1395



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1 PETRA Incorporated

Employee Range STEART thru STEART Pay Periods Ending Between 08/01/06 and 04/30/09  
Job Range 060675 thru 060675

Art Stevens

JOB	PHASE	COST CODE	PERIOD ENDING	EMPLOYEE CODE	REG HOURS
60675	1	410	2/3/2007	STEART	9
60675	1	410	2/10/2007	STEART	10
60675	1	410	2/17/2007	STEART	8
Total					27

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Company No. 1 PETRA Incorporated  
Printing: Employee Range PIESTE thru PIESTE Pay Periods Ending Between 08/01/06 and 04/30/09  
Job Range 060675 thru 060675

Steve Pierce

JOB	PHASE	COST CODE	PERIOD ENDING	EMPLOYEE CODE	REG HOURS
60675	1	405	1/13/2007	PIESTE	11
60675	1	405	1/20/2007	PIESTE	24
60675	1	405	3/3/2007	PIESTE	16
60675	1	405	3/10/2007	PIESTE	24
Total					75

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1 PETRA Incorporated

Employee Range JOHADA thru JOHANA Pay Periods Ending Between 08/01/06 and 04/30/09  
Job Range 060675 thru 060675

Adam Johnson

JOB	PHASE	COST CODE	PERIOD ENDING	EMPLOYEE CODE	REG HOURS
60675	1	405	8/19/2006	JOHADA	2
60675	1	405	9/23/2006	JOHADA	3
60675	1	405	9/30/2006	JOHADA	4
60675	1	405	10/28/2006	JOHADA	6
60675	1	405	11/4/2006	JOHADA	4
60675	1	405	11/11/2006	JOHADA	12
60675	1	405	11/18/2006	JOHADA	12
60675	1	405	11/25/2006	JOHADA	8
60675	1	405	12/16/2006	JOHADA	1
60675	1	405	1/20/2007	JOHADA	10
60675	1	405	2/3/2007	JOHADA	16
60675	1	405	2/10/2007	JOHADA	15
60675	1	405	2/17/2007	JOHADA	4
60675	1	405	2/24/2007	JOHADA	6
60675	1	405	3/3/2007	JOHADA	18
60675	1	405	3/10/2007	JOHADA	27
60675	1	405	3/17/2007	JOHADA	35
60675	1	405	3/24/2007	JOHADA	29
60675	1	405	3/31/2007	JOHADA	23
60675	1	405	4/7/2007	JOHADA	29
60675	1	405	4/14/2007	JOHADA	27
60675	1	405	4/21/2007	JOHADA	23
60675	1	405	4/28/2007	JOHADA	18
60675	1	405	5/5/2007	JOHADA	17
60675	1	405	5/12/2007	JOHADA	14
60675	1	405	5/19/2007	JOHADA	23
60675	1	405	5/26/2007	JOHADA	34
60675	1	405	6/2/2007	JOHADA	38
60675	1	405	6/9/2007	JOHADA	39
60675	1	405	6/16/2007	JOHADA	36
60675	1	405	6/23/2007	JOHADA	37
60675	1	405	6/30/2007	JOHADA	40
60675	1	405	7/7/2007	JOHADA	32
60675	1	405	7/14/2007	JOHADA	40
60675	1	405	7/21/2007	JOHADA	36
60675	1	405	7/28/2007	JOHADA	40
60675	1	405	8/4/2007	JOHADA	34
60675	1	405	8/11/2007	JOHADA	35
60675	1	405	8/18/2007	JOHADA	28
60675	1	405	8/25/2007	JOHADA	27
60675	1	405	9/1/2007	JOHADA	19
60675	1	405	9/8/2007	JOHADA	23
60675	1	405	9/15/2007	JOHADA	28
60675	1	405	9/22/2007	JOHADA	29
60675	1	405	9/29/2007	JOHADA	28
60675	1	405	10/6/2007	JOHADA	28
60675	1	405	10/13/2007	JOHADA	24
60675	1	405	10/20/2007	JOHADA	21
60675	1	405	10/27/2007	JOHADA	19
60675	1	405	11/3/2007	JOHADA	20
60675	1	405	11/10/2007	JOHADA	20
60675	1	405	11/17/2007	JOHADA	23
60675	1	405	11/24/2007	JOHADA	12

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Company No.	1 PETRA Incorporated			
Printing:	Employee Range JOHADA thru JOHANA Pay Periods Ending Between 08/01/06 and 04/30/09			
	Job Range 060675 thru 060675			

Adam Johnson

JOB	PHASE	COST CODE	PERIOD ENDING	EMPLOYEE CODE	REG HOURS
60675	1	405	12/1/2007	JOHADA	26
60675	1	405	12/8/2007	JOHADA	32
60675	1	405	12/15/2007	JOHADA	33
60675	1	405	12/22/2007	JOHADA	33
60675	1	405	12/29/2007	JOHADA	14
60675	1	405	1/5/2008	JOHADA	12
60675	1	405	1/12/2008	JOHADA	15
60675	1	405	1/19/2008	JOHADA	11
60675	1	405	1/26/2008	JOHADA	38
60675	1	405	2/2/2008	JOHADA	20
60675	1	405	2/9/2008	JOHADA	2
60675	1	405	2/16/2008	JOHADA	1
60675	1	405	3/1/2008	JOHADA	8
60675	1	405	3/29/2008	JOHADA	20
60675	1	405	4/5/2008	JOHADA	40
60675	1	405	4/12/2008	JOHADA	40
60675	1	405	4/19/2008	JOHADA	40
Total					1561

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Employee Range PLONIC thru PLONIC Pay Periods Ending Between 08/01/06 and 04/30/09  
Job Range 060675 thru 060675

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Nick Ploetz

JOB	PHASE	COST CODE	PERIOD ENDING	EMPLOYEE CODE	REG HOURS
60675	1	405	6/28/2008	PLONIC	24
60675	1	405	7/19/2008	PLONIC	25
60675	1	405	7/26/2008	PLONIC	25
60675	1	405	11/29/2008	PLONIC	20
60675	1	405	12/6/2008	PLONIC	32
Total					126

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**Employee Range ANDJOH thru ANDJOH Pay Periods Ending Between 08/01/06 and 04/30/09**  
**Job Range 060675 thru 060675**

**Jon Anderson**

JOB	PHASE	COST CODE	PERIOD ENDING	EMPLOYEE CODE	REG HOURS
60675	1	420	3/3/2007	ANDJOH	4
60675	1	420	3/10/2007	ANDJOH	8
60675	1	420	3/17/2007	ANDJOH	32
60675	1	420	3/24/2007	ANDJOH	40
60675	1	420	3/31/2007	ANDJOH	40
60675	1	420	4/7/2007	ANDJOH	36
60675	1	420	4/14/2007	ANDJOH	40
60675	1	420	4/21/2007	ANDJOH	40
60675	1	420	4/28/2007	ANDJOH	40
60675	1	420	5/5/2007	ANDJOH	40
60675	1	420	5/12/2007	ANDJOH	32
60675	1	420	5/19/2007	ANDJOH	40
60675	1	420	5/26/2007	ANDJOH	37
60675	1	420	6/2/2007	ANDJOH	40
60675	1	420	6/9/2007	ANDJOH	40
60675	1	420	6/16/2007	ANDJOH	32
60675	1	420	6/23/2007	ANDJOH	40
60675	1	420	6/30/2007	ANDJOH	40
60675	1	420	7/7/2007	ANDJOH	40
60675	1	420	7/14/2007	ANDJOH	40
60675	1	420	7/21/2007	ANDJOH	36
60675	1	420	7/28/2007	ANDJOH	40
60675	1	420	8/4/2007	ANDJOH	40
60675	1	420	8/11/2007	ANDJOH	40
60675	1	420	8/18/2007	ANDJOH	39
60675	1	420	8/25/2007	ANDJOH	40
60675	1	420	9/1/2007	ANDJOH	40
60675	1	420	9/8/2007	ANDJOH	32
60675	1	420	9/15/2007	ANDJOH	40
60675	1	420	9/22/2007	ANDJOH	40
60675	1	420	9/29/2007	ANDJOH	32
60675	1	420	10/6/2007	ANDJOH	40
60675	1	420	10/13/2007	ANDJOH	39
60675	1	420	10/20/2007	ANDJOH	40
60675	1	420	10/27/2007	ANDJOH	38
60675	1	420	11/3/2007	ANDJOH	39
60675	1	420	11/10/2007	ANDJOH	40
60675	1	420	11/17/2007	ANDJOH	39
60675	1	420	11/24/2007	ANDJOH	24
60675	1	420	12/1/2007	ANDJOH	40
60675	1	420	12/8/2007	ANDJOH	37
60675	1	420	12/15/2007	ANDJOH	35
60675	1	420	12/22/2007	ANDJOH	39
60675	1	420	12/29/2007	ANDJOH	24
60675	1	420	1/5/2008	ANDJOH	32
60675	1	420	1/12/2008	ANDJOH	40
60675	1	420	1/19/2008	ANDJOH	40
60675	1	420	1/26/2008	ANDJOH	16
60675	1	420	2/9/2008	ANDJOH	37
60675	1	420	2/16/2008	ANDJOH	35
60675	1	420	2/23/2008	ANDJOH	32
60675	1	420	3/1/2008	ANDJOH	40
60675	1	420	3/8/2008	ANDJOH	36

60675	1	420	3/15/2008	ANDJOH	38
60675	1	420	3/22/2008	ANDJOH	33
60675	1	420	3/29/2008	ANDJOH	40
60675	1	420	4/5/2008	ANDJOH	38
60675	1	420	4/12/2008	ANDJOH	38
60675	1	420	4/19/2008	ANDJOH	38
60675	1	420	4/26/2008	ANDJOH	40

2167

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1 PETRA Incorporated  
Employee Range VAUJER thru VAUJER Pay Periods Ending Between 08/01/06 and 04/30/09  
Job Range 060675 thru 060675

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Jack Vaughn

JOB	PHASE	COST CODE	PERIOD ENDING	EMPLOYEE CODE	REG HOURS
60675	1	420	4/19/2008	VAUJER	7
60675	1	420	4/26/2008	VAUJER	20
60675	1	420	5/3/2008	VAUJER	40
60675	1	420	5/10/2008	VAUJER	40
60675	1	420	5/17/2008	VAUJER	40
60675	1	420	5/24/2008	VAUJER	40
60675	1	420	5/31/2008	VAUJER	24
60675	1	420	6/7/2008	VAUJER	40
60675	1	420	6/14/2008	VAUJER	40
60675	1	420	6/21/2008	VAUJER	37
60675	1	420	6/28/2008	VAUJER	35
60675	1	420	7/5/2008	VAUJER	32
60675	1	420	7/12/2008	VAUJER	40
60675	1	420	7/19/2008	VAUJER	40
60675	1	420	7/26/2008	VAUJER	40
60675	1	420	8/2/2008	VAUJER	40
60675	1	420	8/9/2008	VAUJER	40
60675	1	420	8/16/2008	VAUJER	30
60675	1	420	8/23/2008	VAUJER	40
60675	1	420	8/30/2008	VAUJER	40
60675	1	420	9/6/2008	VAUJER	32
60675	1	420	9/20/2008	VAUJER	40
60675	1	420	9/27/2008	VAUJER	32
60675	1	420	10/4/2008	VAUJER	40
60675	1	420	10/11/2008	VAUJER	40
60675	1	420	10/18/2008	VAUJER	40
Total					929



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1 PETRA Incorporated

Employee Range CHIPAT thru CHIPAT Pay Periods Ending Between 08/01/06 and 04/30/09  
Job Range 080675 thru 060675

Pat Child

JOB	PHASE	COST CODE	PERIOD ENDING	EMPLOYEE CODE	REG HOURS
60675	1	420	7/5/2008	CHIPAT	32
60675	1	420	7/12/2008	CHIPAT	40
60675	1	420	7/19/2008	CHIPAT	40
60675	1	420	7/26/2008	CHIPAT	40
60675	1	420	8/2/2008	CHIPAT	40
60675	1	420	8/9/2008	CHIPAT	40
60675	1	420	8/16/2008	CHIPAT	40
60675	1	420	8/23/2008	CHIPAT	40
60675	1	420	8/30/2008	CHIPAT	40
60675	1	420	9/6/2008	CHIPAT	40
60675	1	420	9/13/2008	CHIPAT	40
60675	1	420	9/20/2008	CHIPAT	40
60675	1	420	9/27/2008	CHIPAT	20
60675	1	420	10/4/2008	CHIPAT	20
60675	1	420	10/11/2008	CHIPAT	20
60675	1	420	10/18/2008	CHIPAT	20
Total					552

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1 PETRA Incorporated

Employee Range DILJER thru DILJER Pay Periods Ending Between 08/01/06 and 04/30/09  
Job Range 060675 thru 060675

Jerry Dillon

JOB	PHASE	COST CODE	PERIOD ENDING	EMPLOYEE CODE	REG HOURS
60675	1	420	12/2/2006	DILJER	16
60675	1	420	12/9/2006	DILJER	40
60675	1	420	12/16/069	DILJER	40
60675	1	420	12/23/2006	DILJER	40
60675	1	420	12/30/2006	DILJER	32
Total					168

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Employee Range BIGHOH thru BIGHOH Pay Periods Ending Between 08/01/06 and 04/30/09  
Job Range 060675 thru 060675

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John Bigham

JOB	PHASE	COST CODE	PERIOD ENDING	EMPLOYEE CODE	REG HOURS
60675	1	420	11/4/2006	BIGJOH	6
60675	1	420	11/11/2006	BIGJOH	26
60675	1	430	11/18/069	BIGJOH	24
Total					56

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Employee Range TRESKO thru TRESKO Pay Periods Ending Between 08/01/06 and 04/30/09  
Job Range 060675 thru 060675

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Scott Trepagnier

JOB	PHASE	COST CODE	PERIOD ENDING	EMPLOYEE CODE	REG HOURS
60675	1	420	8/25/2007	TRESKO	40
60675	1	420	9/8/2007	TRESKO	32
60675	1	430	9/1/2007	TRESKO	40
60675	1	430	9/15/2007	TRESKO	40
60675	1	430	9/22/2007	TRESKO	40
60675	1	430	9/29/2007	TRESKO	40
60675	1	430	10/6/2007	TRESKO	40
60675	1	430	10/13/2007	TRESKO	40
60675	1	430	10/20/2007	TRESKO	37
60675	1	430	10/27/2007	TRESKO	38
60675	1	430	11/3/2007	TRESKO	39
60675	1	430	11/10/2007	TRESKO	40
60675	1	430	11/17/2007	TRESKO	40
60675	1	430	11/24/2007	TRESKO	32
60675	1	430	12/1/2007	TRESKO	40
60675	1	430	12/8/2007	TRESKO	40
60675	1	430	12/15/2007	TRESKO	36
60675	1	430	12/22/2007	TRESKO	40
60675	1	430	12/29/2007	TRESKO	20
60675	1	430	1/5/2008	TRESKO	28
60675	1	430	1/12/2008	TRESKO	35
60675	1	430	1/19/2008	TRESKO	35
60675	1	430	1/26/2008	TRESKO	40
60675	1	430	2/2/2008	TRESKO	37
60675	1	430	2/9/2008	TRESKO	38
60675	1	430	2/16/2008	TRESKO	30
60675	1	430	2/23/2008	TRESKO	32
60675	1	430	3/1/2008	TRESKO	30
60675	1	430	3/8/2008	TRESKO	32
60675	1	430	3/15/2008	TRESKO	33
60675	1	430	3/22/2008	TRESKO	30
60675	1	430	3/29/2008	TRESKO	35
60675	1	430	4/5/2008	TRESKO	30
60675	1	430	4/12/2008	TRESKO	32
60675	1	430	4/19/2008	TRESKO	31
60675	1	430	4/26/2008	TRESKO	31
60675	1	430	5/3/2008	TRESKO	28
60675	1	430	5/10/2008	TRESKO	26
60675	1	430	5/17/2008	TRESKO	30
60675	1	430	5/24/2008	TRESKO	34
60675	1	430	5/31/2008	TRESKO	20
60675	1	430	6/14/2008	TRESKO	20
60675	1	430	6/21/2008	TRESKO	26
60675	1	430	6/28/2008	TRESKO	30
Total					1487

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Company No.  
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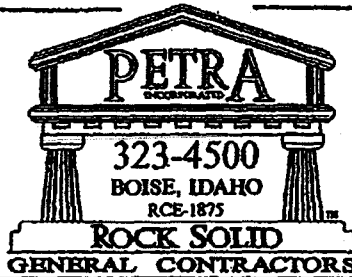
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1 PETRA Incorporated

Employee Range BRODRE thru BRODRE Pay Periods Ending Between 08/01/06 and 04/30/09  
Job Range 060675 thru 060675

Drew Brown

JOB	PHASE	COST CODE	PERIOD ENDING	EMPLOYEE CODE	REG HOURS
60675	1	405	4/26/2008	BRODRE	20
60675	1	405	5/3/2008	BRODRE	40
60675	1	405	7/5/2008	BRODRE	32
60675	1	430	5/10/2008	BRODRE	40
60675	1	430	5/17/2008	BRODRE	40
60675	1	430	5/24/2008	BRODRE	40
60675	1	430	5/31/2008	BRODRE	32
60675	1	430	6/7/2008	BRODRE	32
60675	1	430	6/14/2008	BRODRE	30
60675	1	430	6/21/2008	BRODRE	32
60675	1	430	6/28/2008	BRODRE	32
Total					370



TRANSMITTAL  
No. 00445

RECEIVED

SEP 14 2007

CITY OF MERIDIAN  
CITY CLERK OFFICE

1097 N. ROSARIO STREET • MERIDIAN, ID 83642 • PHONE: (208) 323-4500 • FAX: (208) 323-4507

PROJECT: Meridian City Hall

DATE: 9/14/2007

TO: City of Meridian  
33 E Idaho Avenue

REF: COR 1 CM FEE  
Contaminated Soil

Meridian, ID 83642

PHONE: 888.4433  
FAX: 887.4813  
CELL: 631.6469

ATTN: **Will Baird**

WE ARE SENDING:	SUBMITTED FOR:	ACTION TAKEN:
<input type="checkbox"/> Shop Drawings	<input checked="" type="checkbox"/> Approval	<input type="checkbox"/> Approved as Submitted
<input checked="" type="checkbox"/> Letter	<input checked="" type="checkbox"/> Your Use	<input type="checkbox"/> Approved as Noted
<input type="checkbox"/> Prints	<input type="checkbox"/> As Requested	<input type="checkbox"/> Returned After Loan
<input type="checkbox"/> Change Order	<input checked="" type="checkbox"/> Review and Comment	<input type="checkbox"/> Resubmit
<input type="checkbox"/> Plans		<input type="checkbox"/> Submit
<input type="checkbox"/> Samples	SENT VIA:	<input type="checkbox"/> Returned
<input type="checkbox"/> Specifications	<input checked="" type="checkbox"/> Attached	<input type="checkbox"/> Returned for Corrections
<input type="checkbox"/> Other:	<input type="checkbox"/> Separate Cover Via: Hand Delivery	<input type="checkbox"/> Due Date:

ITEM NO. COPIES DATE ITEM NUMBER REV. NO. DESCRIPTION STATUS

1	1	9/12/2007			COR No.1 for CM FEE on Contaminated Soil Removal with supporting documentation.	OPN
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Remarks:

Will:

Originals have been transmitted to Keith Watts and Ted Baird for review as well.

CC: File

Signed: 

Wes Bettis

Exemption ©

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EXHIBIT

CM002712

514

06015



**CHANGE ORDER REQUEST**  
**No. 00001**

1097 N. ROSARIO STREET • MERIDIAN, ID 83642 • PHONE: (208) 323-4500 • FAX: (208) 323-4507

**TITLE:** Contaminated Soils Removal  
**PROJECT:** Meridian City Hall

**DATE:** 6/27/2007  
**JOB:** 060675

**TO:** Attn: Wes Bettis  
Petra Incorporated  
1097 N Rosario St  
Meridian, Idaho 83642  
Phone: 208-323-4500 Fax: 208-323-4507

**CONTRACT NO:** 1

**RE:** **To:** **From:** **Number:**

**DESCRIPTION OF PROPOSAL:**

Additional CM Fee, Supervision, General Conditions and Reimbursable's during the identification, classification and removal of the contaminated soils found on site. This increase in Fee is in accordance with The Construction Management Agreement between the City of Meridian and Petra Incorporated, Articles 6.2.2 (a), 6.2.2 (b) and 7 (b) relative to Changes in project complexity, size, and conditions.

Item	Description	Stock	Quantity	Units	Unit Price	Tax Rate	Tax Amount	Net Amount
00001	CM Fee on Contaminated Soils Removal at 4.7% of \$422,000		1.000	LS	\$19,834.00	0.00%	\$0.00	\$19,834.00
00002	Project Engineer Time during Contaminated Soils Removal		169.500	Mnhrs	\$45.90	0.00%	\$0.00	\$7,780.05
00003	Project Superintendent Time during Contaminated Soils Removal		336.000	Mnhrs	\$40.40	0.00%	\$0.00	\$13,574.40
00004	% of Contractual GC's for 1 extra month of services due to unforeseen conditions.		1.000	LS	\$11,314.00	0.00%	\$0.00	\$11,314.00

**Unit Cost:** \$52,502.45  
**Unit Tax:** \$0.00  
**Lump Sum:** \$0.00  
**GC markup:** \$0.00  
**Lump Tax:** \$0.00  
**Total:** \$52,502.45

**APPROVAL:**

**By:** \_\_\_\_\_  
Keith Watts

**Date:** \_\_\_\_\_

Exposition®

**By:** \_\_\_\_\_  
Wes Bettis

**Date:** \_\_\_\_\_

CM002713

006016



## GENERAL CONTRACTORS & CONSTRUCTION MANAGEMENT

September 12, 2007

Mr. Will Berg, City Clerk  
Mr. Keith Watts, Purchasing Agent  
CITY OF MERIDIAN  
33 E. Idaho St.  
Meridian, ID

RE: Construction Management Fee Change Order Request No. 1

Gentlemen:

Enclosed is Change Order Request No. 1 for the Construction Management Fee, General Conditions Reimbursable Expenses and Reimbursable Temporary Expenses in accordance with the *Agreement Between the City of Meridian and Petra Incorporated*, the Construction Manager of Record for the New City Hall construction project. In particular as noted in Articles 6.2.2 (a), 6.2.2 (b) and 7 (b) relative to changes in project size, complexity and conditions.

The *Agreement Between the City of Meridian and Petra Incorporated* called for an 80,000 SF building valued at \$12.2 Million dollars for the purpose of setting the CM Fee and establishing the construction schedule. During the Site Preparation Phase, unforeseen conditions were encountered that were not part of the Owner's Request for Services nor were these conditions identified in the Owner provided subsurface exploration documentation. These conditions consisted of petroleum based products found in the soil beginning at the South side of the old boiler house foundation and extending to the South property line. These deposits were found in multiple locations in the Southern 1/3 of the site and were anywhere from 3-0 below surface to 16-0 below surface.

A narrative timeline noting the process involved with the discovery and removal of the contaminated soils is included with this letter, along with a graphical representation of the additional work and the impact to the construction schedule these contaminated soils invoked on the project.

When initially uncovered, it appeared that the contaminated soils were confined to a small area corresponding to possible fuel oil storage tanks possibly located on the South side of the boiler house of the

H:\PROJECTS\2006\WestMeridian City Hall\Change Order Requests\CM Fee Contaminated Soil 09-12-07.doc

1097 N. ROSARIO ST. • MERIDIAN, ID 83642 • PHONE: (208) 323-4500 • FAX: (208) 323-4507

WWW.PETRAINC.NET  
RCE-1875

CM002714

006017



original creamery complex. Exploratory excavation around this find supported an estimate of ~1,000 CY of removal required. Within just a few days after the initial contaminated soil discovery, a second pocket of "goeey dirt" was uncovered. More exploration found multiple sources of contamination that were migrating in a South to Northwest direction in the subsurface strata.

Compounding this issue was the confirmation of a clay layer or lens at approximately the 16-0 below surface level that was containing the ground water below the lens and the soil contamination above the lens. Extra care was utilized in association with the Geo-technical Consultant, Terracon; the Contamination Consultant, MTL; Petra, and Ideal Demolition to first confirm that no ground water contamination was occurring from the site due to the contaminated soil and secondly to keep the clay lens intact while the contaminated soil was removed to preserve the integrity of the protective membrane and insulate the City from creating a ground water contamination issue.

The discovery of the contaminated soils and the extent of the ground water under the clay lens eventually influenced the design of the City Hall building when no entity was found that would accept the discharge of the ground water during the construction dewatering or the long term dewatering that would be required to keep the basement dry due to ground water migration. Raising the building finish floor elevation ~ four feet put the bottom of the basement floor above the clay lens and out of any ground water influence, except for normal surface water migration. This decision required re-design of the site elevations, the building exterior elevations and the basement foundation drain, all after the Phase II-Shell and Core packages had been awarded.

Upon discovery of the contaminated soils, Petra Incorporated brought Project Superintendent Jon Anderson on site a full month before he was scheduled to start the site excavation which was to be April 4, 2007. Jon arrived on site March 5, 2007 and began directing the contaminated soil removal. Due to the extent of the contamination and the change in design, the contaminated soil removal and correction to the site elevations began on March 12, 2007 and the last load of contaminated soil left the site on May 14, 2007. The Site Contractor for the new construction, MJ's Backhoe and Excavation, Inc. mobilized on site on May 7, 2007 and began working on importing structural fill to replace the material removed as contaminated and removing unsuitable soils identified by Terracon, Inc. that did not meet the Geo-technical report requirements.

Petra Incorporated is asking for 336 of the 380 man hours that Mr. Anderson spent on the Meridian City Hall project during this period of contaminated soil removal from March 5, 2007 through May 14, 2007 managing the contaminated soil removal and well closures which were not part of the original scope of work in the Site Preparation Phase of Petra's CM agreement with the City of Meridian. In addition, Petra is asking for reimbursement for 169.5 man hours of Project Engineer time spent during this same time period of the 294 man hours spent by the Project Engineer. No request for compensation for Project Director/Manager Gene Bennett's 82.0 man hours has been requested. In comparison the contract for the Site Preparation Phase was to include 5% of the Project Manager and Project Engineer's time.

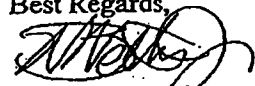
CM Fee Change Order No. 1  
Page 3.  
September 12, 2007

No Project Superintendent time was included since no extensive work was anticipated, based on the Brownsfield Report provided by the City.

The additional CM Fee that is being requested is in accordance with Articles 6.2.2 (a), 6.2.2 (b) and 7 (b) due to changes in project complexity, size and conditions. The total cost for the removal of the contaminated soils, as confirmed by Meridian City Purchasing is \$422,000.00 in compensation to Ideal Demolition, Inc. Petra is requesting 4.7% of the amount paid to Ideal Demolition, Inc. in additional CM Fee or \$19,384.00.

Since this was an unforeseen issue that could not be anticipated and included multiple participants including Hydrologic for the well closures, Terracon for soil and water testing beyond their original contract and MTI for all of the contamination testing, work plan and documentation with IDEQ; Petra has only included the costs for the actual contaminated soil removal by the abatement contractor rather than include the costs of all of the activities that Petra was managing during that time frame.

Best Regards,



Wesley W Bettis Jr.  
Construction Manager

Encl

c: Ted Baird City Attorney's Office  
File

H:\PROJECTS\2006\West\Meridian City Hall\Change Order Requests\CM Fee Contaminated Soil 09-12-07.doc

CM002716

006019

Date: 09/07/2007

## \*\*\* DAILY JOB COST DETAIL \*\*\*

Report Code: 28.71

Time: 01:54:28 PM

Page: 1

Company No. 1 PETRA Incorporated

Printing: Open Jobs Only Job Range: Multiple Selected

Phase Codes 01 thru 01 Cost Codes 410 thru 420

Transaction Date Range 02/26/07 thru 05/31/07

DATE	PHASE	COST CODE	CHG ORD	DESCRIPTION	TRANSACTION DESCRIPTION	LABOR HOURS	MATERIAL UNITS	MATL CODE	EQUIP HOURS	EQUIP CODE	JOB COST \$
Job No. 060675 Meridian City Hall											
02/26/07	01	410		Project Manager	Eugene R. Bennett	4.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	5.75					
	01	420		Project Superintendent	Jon J. Anderson	4.00					
02/27/07	01	410		Project Manager	Eugene R. Bennett	4.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	5.25					
02/28/07	01	410		Project Manager	Eugene R. Bennett	4.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	4.50					
03/01/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	3.75					
03/02/07	01	410		Project Manager	Eugene R. Bennett	4.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	4.25					
03/03/07	01	410		Project Manager	P/R PE 03/03/07						2,231.44
	01	420		Project Superintendent	P/R PE 03/03/07						176.42
03/05/07	01	410		Project Manager	Eugene R. Bennett	3.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	5.75					
	01	420		Project Superintendent	Jon J. Anderson	4.00					
03/06/07	01	410		Project Manager	Eugene R. Bennett	1.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	6.25					
	01	420		Project Superintendent	Jon J. Anderson	4.00					
03/07/07	01	410		Project Manager	Eugene R. Bennett	2.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	3.50					
03/08/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	5.75					
03/09/07	01	410		Project Manager	Eugene R. Bennett	2.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	5.25					
03/10/07	01	410		Project Manager	P/R PE 03/10/07						1,827.97
	01	420		Project Superintendent	P/R PE 03/10/07						352.84
03/12/07	01	410		Project Manager	Eugene R. Bennett	3.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	5.75					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
03/13/07	01	410		Project Manager	Eugene R. Bennett	1.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	6.25					

CM002717

006020

Date: 09/07/2007

## \*\*\* DAILY JOB COST DETAIL \*\*\*

Report Code: 28.71

Time: 01:54:28 PM

Page: 2

Company No. 1 PETRA Incorporated

Printing: Open Jobs Only Job Range: Multiple Selected

Phase Codes 01 thru 01 Cost Codes 410 thru 420

Transaction Date Range 02/26/07 thru 05/31/07

DATE	PHASE	COST	CHG	DESCRIPTION	TRANSACTION DESCRIPTION	LABOR	MATERIAL	MATL	EQUIP	EQUIP	JOB COST
		CODE	ORD			HOURS	UNITS	CODE	HOURS	CODE	\$
Job No. 060675 Meridian City Hall					(continued)						
03/13/07	01	420		Project Superintendent	Jon J. Anderson	8.00					
03/14/07	01	410		Project Manager	Eugene R. Bennett	2.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	3.50					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
03/15/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	5.75					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
03/16/07	01	410		Project Manager	Eugene R. Bennett	2.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	5.50					
03/17/07	01	410		Project Manager	P/R PE 03/17/07						1,840.06
	01	420		Project Superintendent	P/R PE 03/17/07						1,411.42
03/19/07	01	410		Project Manager	Eugene R. Bennett	2.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	6.00					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
03/20/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	6.25					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
03/21/07	01	410		Project Manager	Eugene R. Bennett	2.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	5.25					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
03/22/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	4.75					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
03/23/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	5.50					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
03/24/07	01	410		Project Manager	P/R PE 03/24/07						1,614.15
	01	420		Project Superintendent	P/R PE 03/24/07						1,764.30
03/26/07	01	410		Project Manager	Eugene R. Bennett	2.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	5.75					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
03/27/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	5.75					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
03/28/07	01	410		Project Manager	Eugene R. Bennett	2.00					

CM002718

006021

Date: 09/07/2007

## \*\*\* DAILY JOB COST DETAIL \*\*\*

Report Code: 28.71

Time: 01:54:28 PM

Page: 3

Company No. 1 PETRA Incorporated

Printing: Open Jobs Only Job Range: Multiple Selected

Phase Codes 01 thru 01 Cost Codes 410 thru 420

Transaction Date Range 02/26/07 thru 05/31/07

DATE	PHASE	COST CODE	CHG ORD	DESCRIPTION	TRANSACTION DESCRIPTION	LABOR HOURS	MATERIAL UNITS	MATL CODE	EQUIP HOURS	EQUIP CODE	JOB COST \$
Job No. 060675 Meridian City Hall					(continued)						
03/28/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	6.00					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
03/29/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	5.25					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
03/30/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	6.25					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
03/31/07	01	410		Project Manager	P/R PE 03/31/07						1,400.34
	01	410		Project Manager	P/R PE 03/31/07						273.06
	01	420		Project Superintendent	P/R PE 03/31/07						1,764.30
04/02/07	01	410		Project Manager	Eugene R. Bennett	4.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	6.75					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/03/07	01	410		Project Manager	Eugene R. Bennett	7.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	6.25					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/04/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	7.25					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/05/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	7.25					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/06/07	01	420		Project Superintendent	Jon J. Anderson	4.00					
04/07/07	01	410		Project Manager	P/R PE 04/07/07						2,074.34
	01	420		Project Superintendent	P/R PE 04/07/07						1,587.87
04/09/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	6.87					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	6.84					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/10/07	01	410		Project Manager	Eugene R. Bennett	7.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	7.27					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/11/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	6.40					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/12/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	6.67					

CM002719

006022

Date: 09/07/2007

## \*\*\* DAILY JOB COST DETAIL \*\*\*

Report Code: 28.71

Time: 01:54:28 PM

Page: 4

Company No. 1 PETRA Incorporated

Printing: Open Jobs Only Job Range: Multiple Selected

Phase Codes 01 thru 01 Cost Codes 410 thru 420

Transaction Date Range 02/26/07 thru 05/31/07

DATE	PHASE	COST	CHG	DESCRIPTION	TRANSACTION DESCRIPTION	LABOR	MATERIAL	MATL	EQUIP	EQUIP	JOB COST
		CODE	ORD			HOURS	UNITS	CODE	HOURS	CODE	\$
Job No. 060675 Meridian City Hall				(continued)							
04/12/07	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/13/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	7.00					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/14/07	01	410		Project Manager	P/R PE 04/14/07						2,126.89
	01	420		Project Superintendent	P/R PE 04/14/07						1,764.30
04/16/07	01	410		Project Manager	Eugene R. Bennett	4.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	6.00					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/17/07	01	410		Project Manager	Eugene R. Bennett	2.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	6.75					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/18/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	7.50					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/19/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	6.25					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/20/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	8.00					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/21/07	01	410		Project Manager	P/R PE 04/21/07						2,073.08
	01	420		Project Superintendent	P/R PE 04/21/07						1,764.30
04/23/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	7.00					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/24/07	01	410		Project Manager	Eugene R. Bennett	1.00					
	01	410		Project Manager	Wesley Wayne Bettis, Jr.	4.25					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/25/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	7.50					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/26/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	7.50					
	01	420		Project Superintendent	Jon J. Anderson	8.00					
04/27/07	01	410		Project Manager	Wesley Wayne Bettis, Jr.	7.00					
	01	420		Project Superintendent	Jon J. Anderson	8.00					

CM002720

006023

**From:** Tom Coughlin  
**Sent:** Thursday, April 24, 2008 10:01 AM  
**To:** Keith Watts  
**Subject:** March Billing Invoice Backup - MCH  
**Attachments:** image001.jpg; Invoices Wnt&Job Cond 0308Billing\_MCH.pdf

Keith

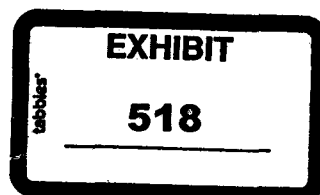
Attached are copies of the contractor invoices for the winter weather protection and miscellaneous job conditions that you had questions on. I have written a short explanation on each invoice to try to better explain what and why in each case.

If you have any further questions please contact me. Can you let me know what the timing on our payment will be?

Thanks  
Tom C

Tom Coughlin  
Project Manager  
Petra, Inc.  
1097 N. Rosario  
Meridian, ID 83642  
Phone: (208) 323-4500 Fax: (208) 323-4507  
E-Mail: tcoughlin@petrainc.net

This Communication contains proprietary business information and may contain confidential information. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately destroy, discard, or erase this information.







**COLD WEATHER CHANGE ORDER #3**

Date: March 25, 2008  
General Contractor: Pctra Inc.  
Project Name & Address: Meridian City Hall  
33 E. Broadway Ave.  
Meridian, ID 83642

**Cold Weather for the Month of February 2008**

**Labor**

Week Ending February 10	\$ 297.00
Week Ending February 17	\$ 126.00
Week Ending February 24	\$ 84.00
Week Ending March 2	\$ 105.00

**Material**

Expendables (Freeze Beads)	\$ 368.62
3 Heaters - Rental	\$ 1554.00

Job Name: MCH  
Job Number: 06-06757  
Cost Code: 01-630  
Authorized by: [Signature]  
Date Posted: 1/1/08 By: [Signature]  
Budget:                       
Over Budget:                     

ENTERED  
MAR 26 2008

Subtotal	\$ 2534.62
OH & P	\$ 380.19
Total	\$ 2914.81

Thank you for your consideration. If you have any questions or require clarification please call at your convenience.

TMC, Inc.

Todd Olson

*LABOR, MATERIAL & EQUIPMENT  
TEMP HEAT & WEATHER PROTECTION FOR  
MASONRY - 2/08*

ID-10335-AA-4(04000), DBA McGourty Masonry NV-47227, CA-759884 OR-82857,  
WA-TMCIN\*\*088PZ, UT-99 371303-5501, AZ-155419

\* \* \* mmunication Result Report ( Feb. 15. 8 3:34PM ) \* \* \*

13

Date/Time: Feb. 15. 2008 3:34PM

File No. Mode	Destination	Pg(s)	Result	Page Not Sent
2526 Memory TX	3234507	P. 3	OK	

## Reason for error

E. 1) Hang up or line fail  
 E. 3) No answer  
 E. 5) Exceeded max. E-mail size

E. 2) Busy  
 E. 4) No localmle connection



DATE: 2/15/08

FAX#: 323-4507

FROM: ERD obm

TO: Petra

ATTN:

RE: Meridian City Hall

COMMENTS: Call Weather Statement

(Not a bill)

NUMBER OF PAGES INCLUDING COVER SHEET

CM009980

006027



2313 West Overland Road • Boise, Idaho 83705  
(208) 331-8200 (208) 331-8342 fax

**COLD WEATHER LABOR REPORT #7**

**Date:** February 15, 2008  
**General Contractor:** Petra Inc.  
**Project Name & Address:** Meridian City Hall  
33 E. Broadway Ave.  
Meridian, ID 83642

**Cold Weather Week Ending February 10, 2008**

**Labor**

Tender	6.50 Hr.	@ 42.00	\$ 273.00
Bricklayer	0.50 Hr.	@ 48.00	\$ 24.00
Foreman	0.00 Hr.	@ 62.00	\$ 0.00
Total			\$ 297.00

This is not a bill. We will be sending you a bill with all labor and material regarding cold weather for January later this month.

Thank you for your consideration. If you have any questions or require clarification please call at your convenience.

TMC, Inc.

Todd Olson

ID-10335-AA-4(04000), DBA McGourty Masonry NV-47227, CA-759884 OR-82857,  
WA-TMCIN\*\*088PZ, UT-99 371303-5501, AZ-155419

CM009981

006028

**Daily Cold Weather Protection**

Foreman: Ron Lough

Job Name: Meridian City Hall

Date: Feb 4-8

Work Description: Heat H<sup>2</sup>O. Planked walls.  
Clear snow

Labor		
Name		Hours
Jose Estrada	>	1
Mark Smith		1/2
Jose Cardenas		1/2
Jose Estrada	>	1
Jose Cardenas		1/2
Mark Smith		1/2
Mark Smith	>	1
Mark Smith		1/2
Mark Smith		1/2
Jose Estrada	>	1/2
Jose Estrada		1/2
Phil Roney		1/2

Equipment	
Name	Type of Equip.

Materials	
Item	Quantity

NOTES: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Ron Lough  
 TMC, Inc. Foreman

John [Signature]  
 General Contractor

\* \* \* nunication Result Report ( Feb. 22. 12:00PM ) \* \* \*

}}}

Date/Time: Feb. 22. 2008 11:59AM

File No. Mode	Destination	Pg(s)	Result	Page Not Sent
2771 Memory TX	3234507	P. 3	OK	

Reasons for error  
 1) Hang up or line fail  
 2) No answer  
 3) Exceeded max. E-mail size

E. 2) Busy  
 E. 4) No facsimile connection



DATE: 2/22/08

FAX #: 323-4507

FROM: TMO OK

TO: Petra

ATTN:

RE: Mendon City Hall

COMMENTS: Cold Water Statement

(Not a bill)

Thanks

NUMBER OF PAGES INCLUDING COVER SHEET

CM009983

006030

**COLD WEATHER LABOR REPORT #8**

**Date:** February 22, 2008  
**General Contractor:** Petra Inc.  
**Project Name & Address:** Meridian City Hall  
33 E. Broadway Ave.  
Meridian, ID 83642

**Cold Weather Week Ending February 17, 2008**

**Labor**

Tender	3.00 Hr.	@ 42.00	\$ 126.00
Bricklayer	0.00 Hr.	@ 48.00	\$ 0.00
Foreman	0.00 Hr.	@ 62.00	\$ 0.00
Total			\$ 126.00

**This is not a bill.** We will be sending you a bill with all labor and material regarding cold weather for January later this month.

Thank you for your consideration. If you have any questions or require clarification please call at your convenience.

TMC, Inc.

Todd Olson

ID-10335-AA-4(04000), DBA McGourty Masonry NV-47227, CA-759884 OR-82857,  
WA-TMCIN\*\*088PZ, UT-99 371303-5501, AZ-155419

CM009984

006031



### Daily Cold Weather Protection

Foreman: Ron Smith Job Name: Meredian City Hall  
 Date: Feb 11-15  
 Work Description: Heating of masonry blanket etc.

Labor		
Name		Hours
Mark Williams	T Feb-11	1/2
Jose Estrada	T Feb-12	1/2
Jose Estrada	T Feb-13	1/2
Jose Estrada	T Feb-14	1/2
Mark Smith	T Feb-14	1/2
Jose Estrada	T Feb-15	1/2

Equipment	
Name	Type of Equip.

Materials	
Item	Quantity

NOTES: \_\_\_\_\_

Ron Smith  
TMC, Inc. Foreman

[Signature]  
General Contractor

All forms must be signed by the General Contractor

\* \* \* munication Result Report ( Feb. 29. 8 3:53PM ) \* \* \*

1)

Date/Time: Feb. 29. 2008 3:52PM

File No. Mode	Destination	Pg(s)	Result	Page Not Sent
3111 Memory TX	3234507	P. 3	OK	

## Reason for error

E. 1) Hang up or line fall  
E. 3) No answer  
E. 5) Exceeded max. r mail size

E. 2) Busy  
E. 4) No facsimile connection



DATE: 2/29/07

FAX#: 322-4507

FROM: T-20 Doc

TO: Petra

ATTN:

RE: Meridian City Hall

COMMENTS: Cold weather situation  
(Not a bill)

Thanks,

T-20

NUMBER OF PAGES INCLUDING COVER SHEET:

CM009986

006033



**COLD WEATHER LABOR REPORT #9**

**Date:** February 29, 2008  
**General Contractor:** Petra Inc.  
**Project Name & Address:** Meridian City Hall  
33 E. Broadway Ave.  
Meridian, ID 83642

**Cold Weather Week Ending February 24, 2008**

**Labor**

Tender	2.00 Hr.	@ 42.00	\$ 84.00
Bricklayer	0.00 Hr.	@ 48.00	\$ 0.00
Foreman	0.00 Hr.	@ 62.00	\$ 0.00
Total			\$ 84.00

This is not a bill. We will be sending you a bill with all labor and material regarding cold weather for February next month.

Thank you for your consideration. If you have any questions or require clarification please call at your convenience.

TMC, Inc.

Todd Olson

ID-10335-AA-4(04000), DBA McGourty Masonry NV-47227, CA-759884 OR-82857,  
WA-TMCIN\*\*088PZ, UT-99 371303-5501, AZ-155419

CM009987

006034

### Daily Cold Weather Protection

Foreman: Ron Long Job Name: moravian city hall  
 Date: Feb 18-22  
 Work Description: Heating of water, etc.

Labor		
Name		Hours
<u>Jose Estrada</u>	<u>Feb 18</u>	<u>1/2</u>
<u>Jose Estrada</u>	<u>Feb 19</u>	<u>1/2</u>
<u>Jose Estrada</u>	<u>Feb 20</u>	<u>1/2</u>
<u>Jose Estrada</u>	<u>Feb 21</u>	<u>0</u>
<u>Jose Estrada</u>	<u>Feb 22</u>	<u>1/2</u>

Equipment	
Name	Type of Equip.

Materials	
Item	Quantity

NOTES: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Ron Long  
 TMC, Inc. Foreman

[Signature]  
 General Contractor

All forms must be signed by the General Contractor

\* \* \* Communication Result Report ( Mar. 10. 3:07PM ) \* \* \*

1)  
2)

Date/Time: Mar. 10. 2008 3:06PM

File No. Mode	Destination	Pg(s)	Result	Page Not Sent
3426 Memory TX	3234507	P. 3	OK	

## Reason for error

1) Hang up or line fail  
 3) No Answer  
 5) Exceeded max. E-mail size

E. 2) Busy  
 E. 4) No facsimile connection



DATE: 3/16/08

FAX #: 323-4507

FROM: J. S. POC

TO: Patra

ATTN:

RE: Meridian City Hall

COMMENTS: Cold Weather Statement  
(Not a bill)

Thanks

T. S. P.

NUMBER OF PAGES INCLUDING COVER SHEET

CM009989

006036

**COLD WEATHER LABOR REPORT #10**

**Date:** March 7, 2008  
**General Contractor:** Petra Inc.  
**Project Name & Address:** Meridian City Hall  
33 E. Broadway Ave.  
Meridian, ID 83642

**Cold Weather Week Ending March 2, 2008**

**Labor**

Tender	2.50 Hr.	@ 42.00	\$ 105.00
Bricklayer	0.00 Hr.	@ 48.00	\$ 0.00
Foreman	0.00 Hr.	@ 62.00	\$ 0.00
Total			\$ 105.00

This is not a bill. We will be sending you a bill with all labor and material regarding cold weather for February next month.

Thank you for your consideration. If you have any questions or require clarification please call at your convenience.

TMC, Inc.

Todd Olson

ID-10335-AA-4(04000), DBA McGourty Masonry NV-47227, CA-759884 OR-82857,  
WA-TMCIN\*\*088PZ, UT-99 371303-5501, AZ-155419

CM009990

006037

### Daily Cold Weather Protection

Foreman: Ken Smith Job Name: Meredith City Hall

Date: Feb 25-29 2003

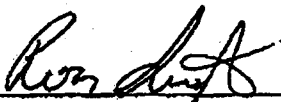
Work Description: Heating of Master For masonry only

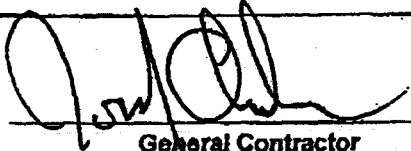
Labor		
Name		Hours
<u>Jose Estrada</u>	<u>Feb 25</u>	<u>1/2</u>
<u>Jose Estrada</u>	<u>Feb 26</u>	<u>1/2</u>
<u>Jose Estrada</u>	<u>Feb 27</u>	<u>1/2</u>
<u>Jose Estrada</u>	<u>Feb 28</u>	<u>1/2</u>
<u>Jose Estrada</u>	<u>Feb 29</u>	<u>1/2</u>

Equipment	
Name	Type of Equip.

Materials	
Item	Quantity

NOTES:

  
 TMC, Inc. Foreman

  
 General Contractor

Job: 2/4/2008 Cost Code: 10719.30.04100 Cost Types: JPB/FMS/OLDW Print Landscape if poss ble: Yes  
 To: 3/2/2008 To: 10719.30.04100 Cost Codes Matching: \*30\* Active Jobs Items with Activity:

**Job Detail Report**  
**TMC INC.**  
**3/20/2008**

Page: 1280300  
 Company:

Job: 10719

Meridian City Hall  
 33 East Broadway Ave.  
 Meridian, ID 83642

Contract: 0.00  
 Change Orders: 0.00  
 Revised: 0.00  
 Prev. Billed: 0.00  
 Open: 0.00

L	Description	Date	Invoice	P.O.	Contract Amount	Billings To Date	Actual	Cost Budget	Overrun	Actual	Hours Budget	Over	Quantity	Bill @	Date Posted	Billing Cycle
100	Phase 30 - Cold Weather															
	MORTAR COLD WEATHER ADDITIVES															
	M	2/7/2008	185984302	10719-3	1 1/2" Freezban Bag		368.62	0.00			0.00		120		2/15/2008	
					Baseline-Bolise											
	Category 04100 Totals					0.00	368.62	0.00	368.62	0.00	0.00	0.00				
	Phase 30 Totals					0.00	368.62	0.00	368.62	0.00	0.00	0.00				
	Job 10719 Totals					0.00	368.62	0.00	368.62	0.00	0.00	0.00				
	Material						368.62		368.62							

006039

CM009992

Job Detail Report  
 TMC INC.  
 3/20/2008

Job: 10719

Meridian City Hall  
 33 East Broadway Ave.  
 Meridian, ID 83642

Contract: 0.00  
 Change Orders: 0.00  
 Revised: 0.00  
 Prev. Billed: 0.00  
 Open: 0.00

IL	Description	Date	Invoice	P.O.	Contract Amount	Billings To Date	Cost			Hours			Quantity	Bill @	Date Posted	Billing Cycle
							Actual	Budget	Overrun	Actual	Budget	Over				
400	Phase: 30 - Cold Weather															
	COLD WEATHER LABOR							24,000.00				0.00				
	L 2/10/2008				CW: 02/10/08 Todd		175.00			7.00					2/10/2008	
	L 2/17/2008				CW: 2/17/08 Todd		75.00			3.00					2/17/2008	
	L 2/24/2008				CW: 02/24/08 Todd		50.00			2.00					2/24/2008	
	L 3/2/2008				CW: 03/02/08 Todd		62.50			2.50					3/2/2008	
	Category 04400 Totals					0.00	362.50	24,000.00	-23,637.50	14.50	0.00	14.50				
	Phase 30 Totals					0.00	362.50	24,000.00	-23,637.50	14.50	0.00	14.50				
	Job 10719 Totals					0.00	362.50	24,000.00	-23,637.50	14.50	0.00	14.50				
	Labor						362.50	24,000.00	-23,637.50	14.50		14.50				

Total Labor 14.5 hrs



2313 W. Overland Rd • Boise, ID 83705  
(208) 331-8200 • Fax (208) 331-8301

DATE: 3/25/08

FAX#: 323-4507

FROM: J. Quinn

TO: Petra

ATTN: \_\_\_\_\_

RE: Meridian City Hall

COMMENTS: Cold weather Billing  
for February 2008

Thanks,

T. Quinn

NUMBER OF PAGES INCLUDING COVER SHEET: \_\_\_\_\_

CM009994

006041



Davis Construc  
362 Rio Vista E  
McCall, ID 83638  
Phone 573-9732  
Fax 208-634-1612

# Invoice

DATE	INVOICE #
3/26/2008	128

BILL TO	SHIP TO
Petra Inc.	

DUE DATE	P.O. NUMBER
4/25/2008	

ITEM	DESCRIPTION	QTY	RATE	AMOUNT
Meridian City Hall	labor - WINDOW WRAP  Job Name: <u>MCCH</u> Job Number: <u>060675</u> Cost Code: _____ Authorized by: <u>1</u> <u>ICB</u> Date Posted: _____ By: <u>[Signature]</u> Budget: _____ Over Budget: _____  WINTER CONDITIONS TEMPORARY PROTECTION OF WINDOWS TO KEEP WEATHER OUT & TEMP HEAT IN  DAVIS - WAS CITATION & MORE SKILL THAN TEMPS FROM LABOR READY.	92	10.00	920.00
Subtotal				920.00
0% Tax				
Total				920.00

ENTERED  
MAR 26 2008

CM009995

006042

# SIDEWALKS, LLC

1735 S Millenium Way  
Meridian ID 83642

## Invoice

Date	Invoice #
3/18/2008	08-3041

Bill To
Petra 1097 N. Rosario St. Meridian, ID 83642

Meridian City Hall

Due Date	P.O. No.
4/10/2008	City Hall

Quantity	Description	Rate	Amount
1	Water pump north elevator November Labor 7 man hours \$350 Material \$150  Job Name: <u>MECH</u> Job Number: <u>060625</u> Cost Code: <u>01-630</u> Authorized by: <u>          </u> Date Posted: <u>          </u> By: <u>          </u> Budget: <u>          </u> Over Budget: <u>          </u>  <u>LABOR &amp; EQUIPMENT TO</u> <u>REMOVE WATER FROM THE</u> <u>BUILDING - ELEVATOR PIT</u>  <u>WINTER CONDITIONS</u>	500.00	500.00
		<b>Total</b>	<b>\$500.00</b>

ENTERED  
MAR 19 2008

Phone #	Fax #
(208)955-9000	(208)955-9050

Payments/Credits	\$0.00
Balance Due	\$500.00

CM009996

006043

# SIDEWALKS, LLC

1735 S Millenium Way  
Meridian ID 83642

## Invoice

Date	Invoice #
3/18/2008	08-3042

Bill To
Petra 1097 N. Rosario St. Meridian, ID 83642

Meridian City Hall

Due Date	P.O. No.
4/10/2008	City Hall

Quantity	Description	Rate	Amount
1	Heating Rental, visqueen, and set up \$1175	1,175.00	1,175.00
	<p><u>DGL-08</u></p> <p>SETUP TENT &amp; HEAT TO PROTECT CONCRETE POUR FROM THE WEATHER</p> <p>Job Name: <u>MLA</u></p> <p>Job Number: <u>060675</u></p> <p>Cost Code: <u>02-630</u></p> <p>Authorized by: <u>1</u></p> <p>Date Posted: <u>1</u> By: <u>1</u></p> <p>Budget: <u>                    </u></p> <p>Over Budget: <u>                    </u></p>		
	Winter Conditions		
Total			\$1,175.00

Phone #	Fax #
(208)955-9000	(208)955-9050

Payments/Credits	\$0.00
Balance Due	\$1,175.00

CM009997

006044



6679 S Summit Way  
Boise ID 83716  
(208) 433-0933 (208) 433-0935  
www.mjsbackhoe.com

# INVOICE

Invoice No: 434  
Date: 3/31/2008  
Due Date: 4/30/2008

Bill To:  
Petra Contractors  
1097 N Rosario  
Meridian ID 83642

Job No: 7004  
Description: MERIDIAN CITY HALL  
PO #:

Quantity	Description	Unit Price	Extended Price
1.00	FWA 12/5/07	311.00	311.00
1.00	FWA 12/20/07	311.00	311.00
1.00	FWA 1/4/08	220.00	220.00
0.02	2% BOND INCREASE	850.00	17.00

NO BOND

LABOR & EQUIPMENT TO REPAIR & MAINTAIN  
THE CONSTRUCTION ENTRANCES FOR THE  
SWPPP

Job Name: MCH  
Job Number: 86-0675  
Cost Code: 01-630  
Authorized by: [Signature]  
Date Posted: [Signature] By: [Signature]  
Budget: [Signature]  
Over Budget: [Signature]

Winter Conditions -

\$842

Thank You For Your Business!

Amount Now Due: 859.00

Terms: Thirty Days from Invoice

CM009998

006045



6679 S. Supply Way  
Boise, ID 83716

License RCE-8597

Phone: (208) 433-0933  
Fax: (208) 433-0935

PROJECT: Meridian City Hall

TRANSMITTAL

NO. 62

TO: Petra Contractors  
1097 N. Rosario Street  
Meridian, ID 83642  
Phone: 208-323-4500 Fax: 208-323-4507

DATE: 04/01/2008

REF: Direct inv. For COR #10 -  
FWA 12/5/07 - 1/4/08

ATTN: Tom Coughlin

JOB: 7004

WE ARE SENDING:	SUBMITTED FOR:	ACTION TAKEN:
<input type="checkbox"/> Shop Drawings	<input type="checkbox"/> Approval	<input type="checkbox"/> Approved as Submitted
<input type="checkbox"/> Letter	<input checked="" type="checkbox"/> Your Use	<input type="checkbox"/> Approved as Noted
<input type="checkbox"/> Prints	<input checked="" type="checkbox"/> As Requested	<input checked="" type="checkbox"/> Resubmit
<input checked="" type="checkbox"/> Change Order	<input type="checkbox"/> Review and Comment	<input type="checkbox"/> Submit
<input type="checkbox"/> Plans	<input type="checkbox"/> Other:	<input type="checkbox"/> Returned
<input type="checkbox"/> Samples	SENT VIA:	<input type="checkbox"/> Returned for Corrections
<input type="checkbox"/> Specifications	<input checked="" type="checkbox"/> Attached	<input type="checkbox"/> Due Date:
<input checked="" type="checkbox"/> Other: Invoice	<input type="checkbox"/> Separate Cover Via:	<input type="checkbox"/> Other:

SUBMITTAL   DRAWING   ITEM NO.   COPIES   DATE   DESCRIPTION

1

03/31/2008 Direct invoice work per your request

REMARKS:

Please call if you have any questions. Thank you.

Signed:

*Chris Apostolou*

Chris Apostolou

Date: 04/01/2008

CM009999

006046



6679 S. Supply Way  
Boise, ID 83716

License RCE-8597

Phone: (208) 433-0933  
Fax: (208) 433-0935

PROJECT: Meridian City Hall

TRANSMITTAL

NO. 49

TO: Petra Contractors  
1097 N. Rosario Street  
Meridian, ID 83642  
Phone: 208-323-4500 Fax: 208-323-4507

DATE: 01/31/2008  
REF: Change Order Request #10  
FWA 12/5 - 1/4/08

ATTN: Tom Coughlin

JOB: 7004

WE ARE SENDING:	SUBMITTED FOR:	ACTION TAKEN:
<input type="checkbox"/> Shop Drawings	<input checked="" type="checkbox"/> Approval	<input type="checkbox"/> Approved as Submitted
<input type="checkbox"/> Letter	<input checked="" type="checkbox"/> Your Use	<input type="checkbox"/> Approved as Noted
<input type="checkbox"/> Prints	<input type="checkbox"/> As Requested	<input type="checkbox"/> Resubmit
<input checked="" type="checkbox"/> Change Order	<input type="checkbox"/> Review and Comment	<input checked="" type="checkbox"/> Submit
<input type="checkbox"/> Plans	<input type="checkbox"/> Other:	<input type="checkbox"/> Returned
<input type="checkbox"/> Samples	SENT VIA:	<input type="checkbox"/> Returned for Corrections
<input type="checkbox"/> Specifications	<input checked="" type="checkbox"/> Attached	<input type="checkbox"/> Due Date:
<input type="checkbox"/> Other:	<input type="checkbox"/> Separate Cover Via:	<input type="checkbox"/> Other:

SUBMITTAL	DRAWING	ITEM NO.	COPIES	DATE	DESCRIPTION
		1		01/31/2008	COR #10 - FWA work 12/5 - 1/4/08

**REMARKS:**

Please call if you have any questions. Thank you.

P.S. I would also like to follow up on RCO #s 8 and 9. They are the only outstanding change orders to date and I believe they may be causing a hold up on our payment for December. Please let me know. Thank you.

Signed:

*Chris Apostolou*  
Chris Apostolou

Date:

01/31/2008

CM010000

006047

MJS Backhoe & Excavation, Inc  
6879 S Supply Way  
Boise, ID 83718

## Change Order

Status: Estimated

Date: 01/31/08

Internal CO: 10

Internal Job No: 7004

Petra Contractors  
1097 N Rosario  
Meridian, ID 83642

MERIDIAN CITY HALL  
1097 N Rosario  
Meridian, ID 83642

Attn:

Owner CO No: COR #10

*impose-pay direct*

FORCED WORK FROM 12/5/07 THROUGH 1/4/08

FVA 12/5/07

FVA 12/20/07

FVA 1/4/08

2% BOND INCREASE

0.00

311.00

311.00

220.00

17.00

Total this Change Order: 859.00

Original Contract: 610,314.00

Previously Approved Change Orders: 162,782.00

Revised Contract to Date: 773,955.00

Accepted Date: \_\_\_\_\_

Accepted By: \_\_\_\_\_

Please sign and return a copy as soon as possible

1 of 1

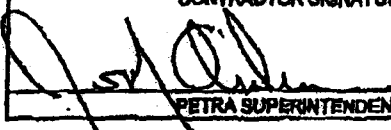
CM010001

006048





**WORK ORDER****PETRA  
INCORPORATED****JOB #**  
**OWNER:** City of Meridian**PROJECT NAME:** Meridian City Hall **DATE:** 12/5/2007  
**ADDRESS:**  
**DESCRIPTION OF WORK:** repair BMP to site off Broadway.

LABOR MJS		STANDARD		OVERTIME		AMOUNT
NAME	OCCUPATION	HOURS	RATE	HOURS	RATE	
JM	OPERATOR	1				
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
SUBTOTAL		1		0		
EQUIPMENT		DAYS	HOURS	RENTAL RATE		AMOUNT
950			1			
SUBTOTAL						
SUPPLIES & MATERIAL		INVOICE	QUANTITIES	UNITS	PRICE	AMOUNT
drain rock			15.68 yds			
SUBTOTAL						
CONTRACTORS		NOTES				AMOUNT
SUBTOTAL						
<b>CONTRACTOR SIGNATURE</b>  <b>PETRA SUPERINTENDENT</b>		<b>SUMMARY</b>				<b>AMOUNT</b>
		LABOR				
		EQUIPMENT RENTAL				
		PERMITS				
		SUPPLIES & MATERIAL				
		SUBCONTRACTOR				
		PETRA OVERHEAD & PROFIT				
		<b>TOTAL</b>				

Received Time Jan. 5. 12:07PM

CM010003

006050

1050

## MJ'S backhoe &amp; Excavati, Inc.

6679 S. Supply Way • Boise, ID 83716 • Phone (208) 433-0933 • Fax (208) 433-0935

## Daily Report

 JOB NAME/NO. MERIDIAN C. Ly Hall  
 JOB ADDRESS \_\_\_\_\_  
 CONTRACTOR/SUPER. Jon

 DATE 12-5-07  
 WEATHER/CONDITIONS CLAR  
 TEMPERATURE: HIGH 45 LOW 40

MANPOWER	HOURS	EQUIPMENT	HOURS
<u>Jim</u>	<u>9</u>	<u>950</u>	<u>9</u>
<u>TRINITY</u>	<u>9</u>	<u>3103G</u>	<u>4</u>
<u>FILIP</u>	<u>9</u>	<u>SKIDSTEER</u>	<u>0</u>
<u>ROSS</u>	<u>10</u>	<u>CAT 1012</u>	<u>2.5</u>
<u>DAVE</u>	<u>10.5</u>		
<u>BILL</u>	<u>4.5</u>		
<u>SCOTT</u>	<u>7</u>		

## MATERIALS/SUBCONTRACT

 INV# TRK 12 - P/RRN - 209.46 yds - ADA - PLAZA SUBGRADE  
 INV# \* DRAIN ROCK - 15.6 yds - ADA - REPAIR NORTH CAMP \* T-1  
 INV# \_\_\_\_\_  
 INV# TRK 12 - P/R - 95.24 yds - ADA - PLAZA SUBGRADE  
 INV# \_\_\_\_\_  
 INV# TRK 22 - P/R - 62.63 yds - ADA - PLAZA SUBGRADE  
 INV# \_\_\_\_\_  
 INV# TRK 3R - RR - 127.19 yds - ADA - PLAZA SUBGRADE  
 INV# \_\_\_\_\_  
 INV# \_\_\_\_\_  
 INV# \_\_\_\_\_  
 INV# \_\_\_\_\_  
 INV# \_\_\_\_\_

## WORK COMPLETED/COMMENTS:

SEWER INSPECTED & BACKFILLED (NO PRESSURE TEST TO BE DONE DUE TO TAP) GRAVED W/ INSULATION (CITY OF MERIDIAN) 100% COMPLETE

BUILDUP PLAZA GRADE W/ P/RRN (NORTH HALF), WORKING LATE FOR PLANE PAD BUILDUP.

NOTE: DEMOLISHED 350 DIRECTIONAL / MODIFIED CAT RAILS

OPENED ROADWAY FOR TRAFFIC (AHEAD) (NOTIFIED / APPROVED)

CLEAN SWEEP - CLEANING ROADWAY AVE

## CHANGE ORDERS:

FOREMAN'S SIGNATURE: 

NOTES ON:

Received Time=Jan. 5.=12:07PM

CM010004

006051

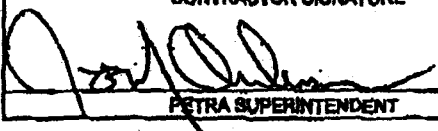
**PETRA  
INCORPORATED**

JOB #  
OWNER: City of Meridian

PROJECT NAME: Meridian City Hall DATE: 12/20/2007  
ADDRESS: \_\_\_\_\_  
DESCRIPTION OF WORK: Repair east entrance from rain / weather

CM010005

**WORK ORDER****PETRA  
INCORPORATED****JOB #**  
**OWNER:** City of Meridian**PROJECT NAME:** Meridian City Hall **DATE:** 12/20/2007  
**ADDRESS:**  
**DESCRIPTION OF WORK:** repair east entrance from rain / weather

LABOR MJS		STANDARD		OVERTIME		AMOUNT
NAME	OCCUPATION	HOURS	RATE	HOURS	RATE	
Jim	OPERATOR	1.5				
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
SUBTOTAL		1.5		0		
EQUIPMENT		DAYS	HOURS	RENTAL RATE		
310			1.5			
SUBTOTAL						
SUPPLIES & MATERIAL		INVOICE	QUANTITIES	UNITS	PRICE	
pit run			20 yards			
SUBTOTAL						
CONTRACTORS		NOTES				
SUBTOTAL						
CONTRACTOR SIGNATURE  PETRA SUPERINTENDENT		SUMMARY				AMOUNT
		LABOR				
		EQUIPMENT RENTAL				
		PERMITS				
		SUPPLIES & MATERIAL				
		SUBCONTRACTOR				
PETRA OVERHEAD & PROFIT						
TOTAL						

Received Time Jan. 5. 12:07PM

CM010006

006053

6679 S. Supply Way • Boise, ID 83716 • Phone (208) 433-0933 • Fax (208) 433-0935

## Daily Report

DATE 12-20-07  
WEATHER/CONDITIONS SNOW  
TEMPERATURE: 45 HIGH 41 LOW

# MATERIALS/SUBCONTRACT

INV# TRK 42 -  
INV#  
INV#  
INV#  
INV#  
V#  
INV#  
INV#  
INV#  
INV#  
INV#  
INV#  
INV#  
INV#  
INV#

**WORK COMPLETED/COMMENTS:**

REPAIR EAST APPROACH - REMOVE UNSUITABLE MATERIALS  
AND REPLACE W/ PIT RUN

MODULIZED BIOSG / DEMONSTRATED

## CHANGE ORDERS:

**FOREMAN'S SIGNATURE:**

NOTES ON RE Received Time Jan. 5. 12:07PM



**WORK ORDER****PETRA  
INCORPORATED**JOB #  
OWNER: City of MeridianPROJECT NAME: Meridian City Hall DATE: 1/4/2008  
ADDRESS:  
DESCRIPTION OF WORK: remove temp access ramp into the building at east side.

LABOR MJS		STANDARD		OVERTIME		AMOUNT
NAME	OCCUPATION	HOURS	RATE	HOURS	RATE	
JR	OPERATOR	2				
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
SUBTOTAL		2		0		
EQUIPMENT		DAYS	HOURS	RENTAL RATE		
310			2			
SUBTOTAL						
SUPPLIES & MATERIAL		INVOICE	QUANTITIES	UNITS	PRICE	
SUBTOTAL						
CONTRACTORS		NOTES				
SUBTOTAL						
		SUMMARY				AMOUNT
		LABOR				
		EQUIPMENT RENTAL				
		PERMITS				
		SUPPLIES & MATERIAL				
		SUBCONTRACTOR				
		PETRA OVERHEAD & PROFIT				
CONTRACTOR SIGNATURE						
PETRA SUPERINTENDENT						TOTAL

Received Time Jan. 5. 12:07PM

CM010009

006056



# MJ'S BACKHOE & EXCAVATION, INC.

8879 S. Supply Way • Boise, ID 83716  
Phn: (208) 433-0933 • Fax (208) 433-0935

Ordered by: John Date: 1-4-08  
SOLD TO: Petra  
Job Location: City Hall  
Customer P.O. No. \_\_\_\_\_ Job No. \_\_\_\_\_ Invoice No. \_\_\_\_\_

EQUIPMENT USED		TOTAL HRS	RATE	SUBTOTAL
Mobilization In / Out	# 62 L.O.	2		
Dump Truck / Single	#			
Dump Truck / End or Pup	#			
Backhoe (4 x 4)	310 56	1		
Mini Excavator				
Skidsteer				
Crawler / Dozer				
Trackhoe Excavator (316L)				
Loader (3 yd bucket)				
Drum Roller 48" / 60"				
Motor Grader (14' Blade)				
Water Truck (4,000 gal.)				
Laborer(s)				
Extra / Rental Equipment:				
Material(s)	Inv. No.			
Permit(s)	No.			
Other Subcontractor(s):	Inv. No.			
INVOICE TOTAL				

## Remarks / Work Done

Mob. on the site. Dig out pit ramp w/ #10 on east side of building

Operator Jason Marshall Driver Scott  
Authorized Signature Petra Date 1-7-08

The LESSEE agrees that the owner and/or operators shall NOT be held responsible for any accident or damages resulting from the said equipment operated as directed on the rental basis. NOT responsible for delays beyond our control.

Costs for materials, permits, rental equipment & other subcontractors are subject to a minimum of 10% mark-up for overhead & profit.

Received Time Jan. 5. 12:07PM.

CM010010

006057





# AMERICAN WALLCOVER, INC.

DRYWALL & ACOUSTICAL SPECIALTIES

2685 E. LANARK STREET, MERIDIAN, ID 83642  
(208) 887-1062 FAX (208) 887-1129

PUBLIC WORKS LIC # 11186-AA-4, ID REGISTRATION # RCE-3899

OREGON LIC # 118119

Randy@americanwallcover.com

## D.F.A. Log

Project Name: Meridian City Hall

Location: Meridian, ID

Date: February 18, 2008

Attn: Tom Coughlin/Petra

RE: Construction DFA 2 Log

DFA 28	\$	560.00
DFA 29 - <i>RR</i>	\$	210.00
DFA 30 - <i>RR</i>	\$	455.00

- ADD ADDITIONAL FRAMING TO SUPPORT  
RR LAVATORY CABS. NO LEGS SHOWN  
FRAMING HAD TO BE ~~STIFFENED~~ STIFFENED  
TO SUPPORT THE LAVATORY TOP FRAME

*OK Ben Tom Anderson*

Sub total	\$	1,225.00
Bond	\$	24.50
Total	\$	1,249.50

Sincerely,

Mike K. Crawford  
Project Manager/American Wallcover, Inc.

*Tom Coughlin*

Job Name: *mch*  
Job Number: *060675*  
Cost Code: *01-930*  
Authorized by:      By:       
Date Posted:       
Budget:       
Over Budget:     

ENTERED  
MAR 25 2008

CM010011

006058




DFA 29

EVALUATION OF WORK								
SUBCONTRACTOR: <u>American Workover, Inc.</u>		Field Director: _____		WEEKDAY: <u>Friday</u>				
PROJECT DIVISION: <u>Commercial Tenant Improvement</u>		CHANGE ORDER # _____		DATE: <u>2-28-08</u>				
PROJECT WBS: <u>Meridian City Hall</u>		WORK ORDER # _____						
PROJECT SUPER: <u>John Anderson</u>								
DESCRIPTION OF WORK: <u>Install Box Headers For Bathroom Counters</u>								
<u>Basement 2nd Fl</u>								
NAME	CLASSIFICATION	HOURS	RATE	OT HOURS	OT RATE	BUILDING	AMOUNT	
<u>Ando Haines</u>	<u>Framer</u>	<u>6</u>	<u>\$ 35.00</u>			<u>MCH</u>	<u>\$ 210.00.</u>	
<u>Hilario Alvarez</u>			<u>\$ 35.00</u>				<u>\$ -</u>	
<u>Bill Hansen</u>			<u>\$ 35.00</u>				<u>\$ -</u>	
<u>Jorge Garibay</u>			<u>\$ 35.00</u>				<u>\$ -</u>	
<u>Gabriel Corza</u>			<u>\$ 35.00</u>				<u>\$ -</u>	
<u>Rodolfo Banos</u>			<u>\$ 35.00</u>				<u>\$ -</u>	
<u>Anthony De Jesus</u>			<u>\$ 35.00</u>				<u>\$ -</u>	
<u>Edgar De Jesus</u>			<u>\$ 35.00</u>				<u>\$ -</u>	
<u>Gonzalo Soto</u>			<u>\$ 35.00</u>				<u>\$ -</u>	
<u>Jose Felix</u>			<u>\$ 35.00</u>				<u>\$ -</u>	
						TOTAL	<u>\$ 210.00.</u>	
TYPE	CLASS	SIZE	QTY	HOURS	RATE	OT RATE	BUILDING	AMOUNT
								<u>\$ -</u>
								<u>\$ -</u>
						TOTAL	<u>\$ -</u>	
DESCRIPTION	QTY	UNIT RATE				BUILDING	AMOUNT	
							<u>\$ -</u>	
							<u>\$ -</u>	
							<u>\$ -</u>	
							<u>\$ -</u>	
						TOTAL	<u>\$ -</u>	
						TOTAL LABOR	<u>210.00.</u>	
						LOADING AMOUNT		
						TOTAL EQUIPMENT AMOUNT		
						TOTAL MATERIAL AMOUNT		
						GRAND TOTAL		
SUBCONTRACTOR APPROVED BY: <u>[Signature]</u> OWNER APPROVED BY: _____								

CM010013

006060

DFA 30

DAILY FORCE ACCOUNT								
SUBCONTRACTOR: <u>American Walkover, Inc.</u>		Field Director: _____		WEEKDAY: <u>Thurs.</u>				
PROJECT DIVISION: <u>Commercial Tenant Improvement</u>		CHANGE ORDER # _____		DATE: <u>2-27-08</u>				
PROJECT WBS: <u>Meridian City Hall</u>		WORK ORDER # _____						
PROJECT SUPER: <u>John Anderson</u>								
DESCRIPTION OF WORK: <u>Install Box Headers For Bathroom Counters</u>								
		<u>1st Fl. + Basement</u>						
NAME	CLASSIFICATION	HOURS	RATE	OT HOURS	OT RATE	BUILDING	AMOUNT	
<u>Andy Haines</u>	<u>Framer</u>	<u>8</u>	<u>\$ 35.00</u>			<u>City Hall</u>	<u>280.00</u>	
<u>Nestor</u>	<u>Framer</u>	<u>5</u>	<u>\$ 35.00</u>			<u>City Hall</u>	<u>175.00</u>	
<u>Bill Hansen</u>			<u>\$ 35.00</u>				<u>\$</u>	
<u>Jorge Garibay</u>			<u>\$ 35.00</u>				<u>\$</u>	
<u>Gabriel Corza</u>			<u>\$ 35.00</u>				<u>\$</u>	
<u>Rodimiro Banos</u>			<u>\$ 35.00</u>				<u>\$</u>	
<u>Anthony De Jesus</u>			<u>\$ 35.00</u>				<u>\$</u>	
<u>Edgar De Jesus</u>			<u>\$ 35.00</u>				<u>\$</u>	
<u>Gonzalo Soto</u>			<u>\$ 35.00</u>				<u>\$</u>	
<u>Jose Felix</u>			<u>\$ 35.00</u>				<u>\$</u>	
TOTAL							<u>455.00</u>	
TYPE	CLASS	SIZE	QTY	HOURS	RATE	OT RATE	BUILDING	AMOUNT
								<u>\$</u>
								<u>\$</u>
TOTAL							<u>\$</u>	
DESCRIPTION	QTY	UNIT RATE				BUILDING	AMOUNT	
<u>10' x 3 1/2" Studs</u>	<u>5</u>					<u>City Hall</u>		
<u>10' x 3 1/2" Truss</u>	<u>5</u>					<u>City Hall</u>		
							<u>\$</u>	
							<u>\$</u>	
							<u>\$</u>	
TOTAL							<u>\$</u>	
TOTAL LABOR							<u>455.00</u>	
LOADING AMOUNT								
TOTAL EQUIPMENT AMOUNT								
TOTAL MATERIAL AMOUNT								
GRAND TOTAL								
 SUBCONTRACTOR APPROVED BY: _____								
OWNER APPROVED BY: _____								

CM010014

006061

# Pac-West Interiors, Inc.

2820 BRANDT AVE. NAMPA, IDAHO 83687  
PHONE (208) 467-3331  
FAX (208) 467-3332

February 19, 2008

Petra, Inc.  
Attn. Mr. Gene Bennett  
9056 West Blackeagle Drive  
Boise, ID 83709

PAC-WEST WAS GIVEN THE  
WRONG BENCHMARK ELEVATION  
TO USE IN SETTING THE  
FLOOR. PETRA SUPT CONFUSED  
THE MARKS

**RE: MERIDIAN CITY HALL**

**SUBJECT: REQUESTED EXTRA PRICING**

*ELEVATION ADJUSTMENT*

*WRONG BENCHMARK ELEV*

**Per Work Authorization**

1. Labor worked 02/12/2008 (see attached):

Amount: 55 Man Hours      \$ 2,062.50

2. Labor worked 02/13/2008 (see attached):

Amount: 66 Man Hours      \$ 2,475.00

**TOTAL: \$ 4,537.50**

*01-930*

*Job Conditions*

Thank you,

Steve Packard

Job Name: *MCH*  
Job Number: *06-0675*  
Cost Code: *01-930*  
Authorized by: *[Signature]*  
Date Posted: *[Signature]* By: *[Signature]*  
Budget: *[Signature]*  
Over Budget: *[Signature]*

**ENTERED**  
**MAR 4 5 2008**

CM010015

006062

# ADDITIONAL WORK AUTHORIZATION

**PacWest**  
Interiors, Inc.

2820 Brandt Ave.  
Nampa, Idaho 83687  
(208) 467-3331

OWNER'S NAME <b>Meridian City Hall</b>		PHONE		DATE <b>2-13-08</b>
STREET		JOB NAME		JOB NUMBER
CITY	STATE	STREET		
EXISTING CONTRACT NUMBER		DATE OF EXISTING CONTRACT	CITY	STATE

You are authorized to perform the following specifically described additional work:

**CHANGE ELEVATION Second floor SOUTH of BLDG.**  
**Take PART & Build BACK AGAIN**

NO.	NAME	START	END	HRS
1	Moises Solas	7:00 AM	1:00 PM	6 hrs
2	Oswaldo Saens	"	"	6 hrs
3	Israel Segura	"	"	6 hrs
4	Francisco Segura	"	"	6 hrs
5	Daniel Segura	"	"	6 hrs
6	Pedro Avalos	"	"	6 hrs
7	Royello Alvaros	"	"	6 hrs
8	Luis Mora	"	"	6 hrs
9	Josue Hernandez	"	"	6 hrs
10	Gonzalo Gallego	"	"	6 hrs
11	Norberto Gutierrez	"	"	6 hrs

**TOTAL 66 men hrs**

**ADDITIONAL CHARGE FOR ABOVE WORK IS: \$** \_\_\_\_\_

Payment will be made as follows: \_\_\_\_\_

Above additional work to be performed under same conditions as specified in original contract unless otherwise stipulated.

Date \_\_\_\_\_ 20\_\_\_\_ Authorizing Signature \_\_\_\_\_

(OWNER SIGN HERE)

We hereby agree to furnish labor and materials - complete in accordance with the above specifications, at above stated price.

Authorized Signature \_\_\_\_\_

(CONTRACTOR SIGN HERE)

Date **2-14-08** 20\_\_\_\_

**THIS IS CHANGE ORDER NO.** \_\_\_\_\_

NOTE: This Revision becomes part of, and in conformance with, the existing contract.

CM010016

006063

# ADDITIONAL WORK AUTHORIZATION

**PacWest Interiors, Inc.**

2820 Brandt Ave.  
Nampa, Idaho 83687  
(208) 467-3331

OWNER'S NAME <b>Meridian City Hall</b>		PHONE	DATE <b>2-12-08</b>
STREET		JOB NAME	JOB NUMBER
CITY	STATE	STREET	
EXISTING CONTRACT NUMBER	DATE OF EXISTING CONTRACT	CITY	STATE

You are authorized to perform the following specifically described additional work:

**Change ELEVATION Second floor South of Building-**

1	Moises Salas	10:00 AM	To	3:30 PM	5 hrs
2	Oswaldo Saens	10:00 AM	To	3:30 PM	5 hrs
3	Israel Segura	10:00 AM	To	3:30 PM	5 hrs
4	Daniel Segura	10:00 AM	To	3:30 PM	5 hrs
5	Francisco Segura	10:00 AM	To	3:30 PM	5 hrs
6	Pedro Avalos	10:00 AM	To	3:30 PM	5 hrs
7	Luis Mora	10:00 AM	To	3:30 PM	5 hrs
8	Josue Hernandez	10:00 AM	To	3:30 PM	5 hrs
9	Jason Otero	10:00 AM	To	3:30 PM	5 hrs
10	Le Roy Otero	10:00 AM	To	3:30 PM	5 hrs
11	Gumecindo Collado	10:00 AM	To	3:30 PM	5 hrs

**TOTAL men hrs 55 hrs**

**ADDITIONAL CHARGE FOR ABOVE WORK IS: \$ 2,062.<sup>00</sup>**

Payment will be made as follows:

Above additional work to be performed under same conditions as specified in original contract unless otherwise stipulated.

Date 20 Authorizing Signature \_\_\_\_\_

(OWNER SIGN HERE)

We hereby agree to furnish labor and materials - complete in accordance with the above specifications, at above stated price.

Authorized Signature \_\_\_\_\_

(CONTRACTOR SIGN HERE)

Date **2-11-08** 20

**THIS IS CHANGE ORDER NO. ....**

NOTE: This Revision becomes part of, and in conformance with, the existing contract.

CM010017

006064

# Par-West Interiors, Inc.

2520 BRANDT AVE. Nampa, IDAHO 83687

PHONE (208) 467-3331

FAX (208) 467-3332

## Fax

To: <u>ADAM</u>	From: <u>SEUE</u>
Company: <u>PETRA</u>	Fax:
Date: <u>2/19/08</u>	Phone:
Re: <u>MERIDIAN CITY HALL</u>	Pages: (Including this Sheet) <u>4</u>
<input type="checkbox"/> Urgent <input type="checkbox"/> For Review <input type="checkbox"/> Please Comment <input type="checkbox"/> Please Reply <input type="checkbox"/> Please Recycle	

Take to Steve P  
3/12 - Bill Separately  
Benchmark Envision incorrect

CM010018

006065



# Pac-West Interiors, Inc.

2820 BRANDT AVE. NAMPA, IDAHO 83687  
PHONE (208) 467-3331  
FAX (208) 467-3332

March 13, 2008

Petra, Inc.  
Attn. Mr. Tom Coughlin  
9056 West Blackeagle Drive  
Boise, ID 83709

**RE: MERIDIAN CITY HALL**

**SUBJECT: ADDITIONAL WORK AUTHORIZATION**

*Remove Portion of Overtime to Accumulate  
Floors - Allow Overtime to Proceed to  
Close in Around My 2nd Floor*

**AWA #3 - 22 Man Hours**

**\$ 412.50**

Thank you,  
Steve Packard

*Job Cancellations  
OK per Jon A*

Job Name: Wet  
Job Number: 060625  
Cost Code: 01-930  
Authorized by: [Signature]  
Date Posted: [Signature] By: [Signature]  
Budget: \_\_\_\_\_  
Over Budget: \_\_\_\_\_

ENTERED  
MAR 25 2008

CM010019

006066

# ADDITIONAL WORK AUTHORIZATION

**Pac West**  
Interiors, Inc.

2820 Brandt Ave.  
Nampa, Idaho 83687  
(208) 467-3331

#3

2/28-29

OWNER'S NAME <b>Meridian City Hall</b>		PHONE	DATE <b>3/27-28-08</b>
STREET		JOB NAME	JOB NUMBER
CITY	STATE	STREET	
EXISTING CONTRACT NUMBER	DATE OF EXISTING CONTRACT	CITY	STATE

You are authorized to perform the following specifically described additional work:

**PAC WEST employees work LATE**  
**Over Time**

<b>Moises Salas</b>	<b>6 hrs</b>
<b>Gumecinda Callado</b>	<b>6 hrs</b>
<b>Jesus Hernandez</b>	<b>1 hrs.</b>
<b>Sergio Chavez</b>	<b>4 hrs</b>
<b>Pedro Avalon</b>	<b>5 hrs</b>

**TOTAL 22 hrs over time**

**Petra PAID of Premium**

**ADDITIONAL CHARGE FOR ABOVE WORK IS: \$ 412.<sup>50</sup>**

Payment will be made as follows:

Above additional work to be performed under same conditions as specified in original contract unless otherwise stipulated.

Date \_\_\_\_\_ 20\_\_\_\_ Authorizing Signature \_\_\_\_\_

We hereby agree to furnish labor and materials - complete in accordance with the above specifications, at above stated price.

Authorized Signature \_\_\_\_\_ Date \_\_\_\_\_ 20\_\_\_\_

**THIS IS CHANGE ORDER NO. \_\_\_\_\_**

NOTE: This Revision becomes part of, and in conformance with, the existing contract.

CM010020

006067

# SIDEWALKS, LLC

1735 S Millenium Way  
Meridian ID 83642

## Invoice

Date	Invoice #
12/21/2007	07-12126

<b>Bill To</b>
Petra 1097 N. Rosario St. Meridian, ID 83642

Meridian City Hall

Due Date	P.O. No.
1/10/2008	City Hall

Quantity	Description	Rate	Amount
1	<p>Cut washer and tighten bolts 11-14-07, 11-26-07, and 11-27-07 Labor 15 man hours \$750 Material \$300</p> <p><i>MODIFY - <del>STANDARD</del> ADD WASHER FOR OVERSIZE HOLDS AT BR36 PLATE - ERECTION AID</i></p> <p><i>JOB CONDITIONS -</i></p> <p>Job Name: <u>MCH</u>            Job Number: <u>060675</u>            Cost Code: <u>08-930</u>            Authorized by: <u>[Signature]</u>            Date Posted: <u>          </u> By: <u>          </u>            Budget: <u>          </u>            Over Budget: <u>          </u></p>	1,050.00	1,050.00
	<p><i>THE HOLDS IN THE BASE PLATES WERE DELIBERATELY OVERSIZED TO AID ERECTION. WASHERS WERE ADDED AFTER THE FACT TO PROVIDE SUFFICIENT BITE FOR THE NUT.</i></p> <p><i>FIELD CONDITIONS DICTATED THIS</i></p>		

**Total** \$1,050.00

Phone #	Fax #
(208)955-9000	(208)955-9050

Payments/Credits	\$0.00
Balance Due	\$1,050.00

CM010021

006068

# 

1735 S Millennium Way  
Meridian ID 83642

## Invoice

Date	Invoice #
8/24/2007	07-8047

<b>Bill To</b>
Petra 1097 N. Rosario St. Meridian, ID 83642

Meridian City Hall

Due Date	P.O. No.
9/10/2007	

Quantity	Description	Rate	Amount
1	Anchor Bolt Replace-Damaged by MJ Backhoe. Drill Rental and Drill Bit \$295.26, Epoxy \$50.00, Labor 2 man hours \$100 Job Name: <u>West</u> Job Number: <u>060675</u> Cost Code: <u>01-930</u> Authorized by: <u>          </u> Date Posted: <u>          </u> By: <u>          </u> Budget: <u>          </u> Over Budget: <u>          </u>  <u>Job Conditions</u>  <u>NEEDS TO BE DELETED FROM MTIS</u>	445.26	445.26
		<b>Total</b>	<b>\$445.26</b>

Phone #	Fax #
(208)955-9000	(208)955-9050

<b>Payments/Credits</b>	<b>\$0.00</b>
<b>Balance Due</b>	<b>\$445.26</b>

CM010022

006069



6679 S S y Way  
Boise ID 83716-  
(208) 433-0933 (208) 433-0935  
www.mjsbackhoe.com

# INVOICE

Invoice No: 433  
Date: 3/31/2008  
Due Date: 5/1/2008

## Bill To:

Petra Contractors  
1097 N Rosario  
Meridian ID 83642

Job No: 7004  
Description: MERIDIAN CITY HALL  
PO #:

Quantity	Description	Unit Price	Extended Price
1.50	Trinity Sackos - Labor to move materials for block storage	46.00	69.00
1.00	Tates Rents inv. #190718; Rental Backhoe	72.00	72.00
2.50	Trinity Sackos - Ran Loader to build approach for crane at Broadway and load out concrete from washout	46.00	115.00
1.00	Ross Denney - Truck Driver to haul off spoils from concrete washout	36.00	36.00
1.00	Bill Newton - Truck Driver to haul off spoils from concrete washout	36.00	36.00
2.50	950 4-yard Cat Loader	79.20	198.00
1.00	Tk #32 Single	49.00	49.00
1.00	Tk #22 Endump	39.00	39.00
13.08	Ada Sand & Gravel	6.65	87.00
0.10	10% O/P	700.00	70.00
0.02	2% Bond Increase - No Bond	800.00	16.00

on Direct Invoices

Job Name: MCH  
Job Number: 06-0675  
Cost Code: 01-930  
Authorized by: [Signature]  
Date Posted: By: [Signature]  
Budget: \_\_\_\_\_  
Over Budget: \_\_\_\_\_

770  
MCH

10% OVERHEAD + PROFIT - ON  
LABOR & EQUIPMENT  
LABOR & EQUIPMENT RATES  
BURDENED RATES, COST  
PROFIT IS NOT INCLUDED.  
GEN OFFICE OH IS NOT INCLUDED.

SITE CONDITIONS

PAY →

771

Thank You For Your Business!

Amount Now Due: 787.00

Terms: Thirty Days from Invoice

CM010023

006070



6679 S. Supply Way  
Boise, ID 83716

License RCE-8597

Phone: (208) 433-0933  
Fax: (208) 433-0936

PROJECT: Meridian City Hall

TRANSMITTAL

NO. 45

TO: Petra Contractors  
9056 W. Blackeagle Drive  
Boise, ID 83709  
Phone: 208-493-2747 Fax: 208-493-2747

DATE: 11/21/2007

REF: COR #9 - Forced Work  
9/27 - 11/9

ATTN: Wes Bettis

JOB: 7004

WE ARE SENDING:	SUBMITTED FOR:	ACTION TAKEN:
<input type="checkbox"/> Shop Drawings	<input checked="" type="checkbox"/> Approval	<input type="checkbox"/> Approved as Submitted
<input type="checkbox"/> Letter	<input checked="" type="checkbox"/> Your Use	<input type="checkbox"/> Approved as Noted
<input type="checkbox"/> Prints	<input checked="" type="checkbox"/> As Requested	<input type="checkbox"/> Resubmit
<input checked="" type="checkbox"/> Change Order	<input type="checkbox"/> Review and Comment	<input checked="" type="checkbox"/> Submit
<input type="checkbox"/> Plans	<input type="checkbox"/> Other:	<input type="checkbox"/> Returned
<input type="checkbox"/> Samples	SENT VIA:	<input type="checkbox"/> Returned for Corrections
<input type="checkbox"/> Specifications	<input checked="" type="checkbox"/> Attached	<input type="checkbox"/> Due Date:
<input type="checkbox"/> Other:	<input type="checkbox"/> Separate Cover Via:	<input type="checkbox"/> Other:

SUBMITTAL   DRAWING   ITEM NO.   COPIES   DATE   DESCRIPTION

1

11/21/2007 COR #9

REMARKS:

Please call if you have any questions. Thank you.

Signed:

Chris Apostolou  
Chris Apostolou

Date: 11/21/2007

CM010024

006071



## WORK ORDER

PETRA  
INCORPORATED

JOB #  
OWNER: City of Meridian

PROJECT NAME: Meridian City Hall DATE: 10/19/2007  
ADDRESS:  
DESCRIPTION OF WORK: move material for block storage.

LABOR M/S		STANDARD		OVERTIME		AMOUNT
NAME	OCCUPATION	HOURS	RATE	HOURS	RATE	
Trinity	OPERATOR	1.5				
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
SUBTOTAL		1.5		0		
EQUIPMENT		DAYS	HOURS	RENTAL RATE		
rental back hoe 310-J			1			
see attached sheet.						
SUBTOTAL						
SUPPLIES & MATERIAL		INVOICE	QUANTITIES	UNITS	PRICE	
SUBTOTAL						
CONTRACTORS		NOTES				
SUBTOTAL						
		SUMMARY				AMOUNT
		LABOR				
		EQUIPMENT RENTAL				
		PERMITS				
		SUPPLIES & MATERIAL				
		SUBCONTRACTOR				
		PETRA OVERHEAD & PROFIT				
CONTRACTOR SIGNATURE						
PETRA SUPERINTENDENT		TOTAL				

Received Time Nov.21. 10:06AM

CM010026

006073



Oct. 31. 2007 2:45P

**MJ'S BACKHOE AND EXCAVATION, INC.**

**No. 0589 P. 2/3**

1030

**M.J'S backhoe & Excavation, Inc.**

6679 S. Supply Way • Boise, ID 83716 • Phone (208) 433-0933 • Fax (208) 433-0935

# Daily Report

JOB NAME/NO. MELDIA City Hall  
JOB ADDRESS \_\_\_\_\_  
CONTRACTOR/SUPER. JOL

DATE 10-19-07  
WEATHER/CONDITIONS Clear  
TEMPERATURE: HIGH 45 LOW 30

[illegible]

**MATERIALS/SUBCONTRACT**

[illegible]

**WORK COMPLETED/COMMENTS:**

GREEN AREA WITH MACHINE FOR BLOW STORAGE

**T-121**

## CRANGE ORDERING

NOTES ON REPLY: Received Time Nov. 21. 10:06AM

CM010027

006074



**PETRA  
INCORPORATED**

**JOB #**  
**OWNER:** City of Meridian

PROJECT NAME: Meridian City Hall DATE: 11/6/2007

ADDRESS: \_\_\_\_\_

DESCRIPTION OF WORK: Build approach for crane at Broadway  
haul out concrete from wash out

LABOR M.J'S		STANDARD		OVERTIME		AMOUNT
NAME	OCCUPATION	HOURS	RATE	HOURS	RATE	
TRINITY SACKOS	OPERATOR	2.5	\$ 46			\$ 116
ROSS DENNEY	DRIVER	1	\$ 36			\$ 36
BILL NEWTON	DRIVER	1	\$ 36			\$ 36
		0	\$ 36			\$ -
		0	\$ 36			\$ -
		0	\$ 36			\$ -
						\$ -
						\$ -
						\$ -
						\$ -
SUBTOTAL				0		\$ 187
EQUIPMENT		DAYS	HOURS	RENTAL RATE		
950 4-YARD LOADER			2.5	\$ 79		\$ 198
315 EXCAVATOR			0	\$ 89		\$ -
310SG JD BACKHOE			0	\$ 54		\$ -
260 SKIDSTEER			0	\$ 49		\$ -
TK #22 ENDUMP			1	\$ 49		\$ 49
TK #32 SINGLE			1	\$ 39		\$ 39
			0	\$ 49		\$ -
SUBTOTAL						\$ -
SUPPLIES & MATERIAL	INVOICE	QUANTITIES		UNITS	PRICE	\$ 286
Ada Sand & Gravel		13.08		cy	6.25/cy + tx	\$ 87
						\$ -
						\$ -
						\$ -
						\$ -
						\$ -
						\$ 87
SUBTOTAL						
		<b>SUMMARY</b>				<b>AMOUNT</b>
		LABOR				\$ 187
		EQUIPMENT RENTAL				\$ 286
<b>CONTRACTOR SIGNATURE</b>		PERMITS				
		SUPPLIES & MATERIAL				\$ 87
		SUBTOTAL				\$ 560
		PETRA OVERHEAD & PROFIT				\$ 56
<b>PETRA SUPERINTENDENT</b>		<b>TOTAL</b>				\$ 615

CM010029


006076

# WORK ORDER

**PETRA  
INCORPORATED**

**JOB #**  
**OWNER:** City of Meridian

PROJECT NAME: Meridian City Hall DATE: 11/8/2007  
ADDRESS: \_\_\_\_\_  
DESCRIPTION OF WORK: build approach for train at Broadway  
haul out concrete from wash out.

LABOR MJS		STANDARD		OVERTIME		AMOUNT
NAME	OCCUPATION	HOURS	RATE	HOURS	RATE	
Trinity	OPERATOR	2.5				
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
	OPERATOR					
SUBTOTAL		2.5		0		
EQUIPMENT		DAYS	HOURS	RENTAL RATE		
loader 950			2.5			
tk. Haul out concrete wash			?			
SUBTOTAL						
SUPPLIES & MATERIAL		INVOICE	QUANTITIES	UNITS	PRICE	
drain rock.			13.08 yds			
SUBTOTAL						
CONTRACTORS		NOTES				
SUBTOTAL						
 CONTRACTOR SIGNATURE PETRA SUPERINTENDENT		SUMMARY				AMOUNT
		LABOR				
		EQUIPMENT RENTAL				
		PERMITS				
		SUPPLIES & MATERIAL				
		SUBCONTRACTOR				
		PETRA OVERHEAD & PROFIT				
		TOTAL				

Received Time Nov.21. 10:06AM

CM010030

006077

## MJ'S backhoe &amp; Excavation, Inc.

1034

6679 S. Supply Way • Boise, ID 83716 • Phone (208) 433-0933 • Fax (208) 433-0935

## Daily Report

JOB NAME/NO. Meridian City HallDATE 11-6-07

JOB ADDRESS \_\_\_\_\_

WEATHER/CONDITIONS ClearCONTRACTOR/SUPER. DonTEMPERATURE: HIGH 60 LOW 43

MANPOWER	HOURS	EQUIPMENT	HOURS
<u>Jim</u>	<u>8</u>	<u>450</u>	<u>8</u>
<u>KAM</u>	<u>8</u>	<u>3035 MINI. DEMO</u>	<u>8</u>
<u>DENIS</u>	<u>8</u>	<u>950</u>	<u>8</u>
<u>TRINITY</u>	<u>8</u>		
<u>LOUI</u>	<u>8</u>		
<u>SCOTT</u>	<u>9</u>		
<u>BILL</u>	<u>7</u>		
<u>BOSS</u>	<u>6</u>		

## MATERIALS/SUBCONTRACT

INV #	<u>TRK 12 - P/R - 113.97 yds - ADA - EAST FOOTING</u>
INV #	
INV #	<u>TRK 22 - P/R - 97.63 yds - ADA - EAST FOOTING</u>
INV #	
INV #	<u>TRK 32 - P/R - 10.02 yds - ADA - EAST FOOTING</u>
INV #	<u>DRIVE ROCK - 13.08 yds - ADA - N. APPROACH</u>
INV #	<u>Reject sand - 41.64 yd - ADA - TRISTATE ELECT. TRENCH</u>
INV #	
INV #	
INV #	
INV #	
INV #	
INV #	

## WORK COMPLETED/COMMENTS:

FINISH GRADE EAST WALL FOOTINGS - ALL FOOTINGS 100% COMPLETE

REBUILD NORTH APPROACH FOR CRANE ACCESS (2.5 HR)  
(TRINITY & 950 LOADER)

BOSS HAULED IN REJECT SAND FOR TRISTATE - APPROX

ONE HAULED OFF CONCRETE FROM WAREHOUSE AREA (1 LOAD)

Received Time Nov. 21. 10:06AM

CM010031

006078



LOCATION #601  
1855 SOUTH COLE ROAD  
BOISE, ID 83709  
208-322-6225  
208-322-6270 FAX

Page: 1  
4 WEEK BILLING INVOICE

Job Site

PETRA INC  
DOWNTOWN MERIDIAN  
MAIN & E BROADWAY  
MERIDIAN, ID 83642  
C#: 208-323-4500 J#: 208-323-4500

3.16941MB 0.360 33203S31.p03 1 of 1 350

000694

PETRA INC  
1097 N ROSARIO STREET  
MERIDIAN ID 83642-8095

Customer.... 680182  
Invoice #... 70631121-003  
Invoice date 2/27/08  
Date out.... 12/18/07 2:10 PM  
Billed thru. 3/11/08  
Job Loc..... DOWNTOWN MERIDIAN, MERIDIAN  
Job No..... 158 PETRA INC - PETR  
P.O. #..... JA23007  
Ordered By.. JON ANDERSON  
Written by.. CYCLE BILL  
Salesperson. 6734  
Terms..... Net 30 Days

PLEASE REMIT PAYMENT TO:  
UNITED RENTALS NORTHWEST, INC.  
PO BOX 100711  
ATLANTA, GA 30384-0711

Qty	Equipment #	Min	Day	Week	4 Week	Amount
1	HEATER 1MM BTU INDIRECT FIRE* 671537 Make: HEAT WAGON Model: VG1000 Ser #: M3743	310.00	310.00	1000.00	2250.00	2250.00
SALES	ITEMS:					
Qty	Item number	Stock class	Unit	Price	Amount	
1	ENV	MCI	EA	10.800	10.80	
	ENVIRONMENTAL CHARGE					
	UM: (EA) EACH					

JON 860-7516

Sub-total: 2260.80  
Tax: 135.65  
Total: 2396.45

BILLED FOR FOUR WEEKS 2/12/08 THRU 3/11/08 02:10 PM  
RENTAL PROTECTION DECLINED

FOR YOUR CONVENIENCE, UNITED RENTALS IS NOW OFFERING  
A TOLL-FREE NUMBER TO CALL EQUIPMENT OFF RENT  
PLEASE CALL 800-UR-RENTS (800-877-3687)

CUSTOMER CARE REPRESENTATIVES ARE AVAILABLE 24/7 TO SUPPLY YOU WITH A  
TERMINATION NUMBER IN ORDER TO CLOSE THIS CONTRACT. A CLEANING CHARGE  
WILL APPLY TO ALL EQUIPMENT RETURNED WITH EXCESSIVE DIRT, CONCRETE,  
AND/OR PAINT. CUSTOMER IS RESPONSIBLE FOR ALL DAMAGES INCLUDING TIRES.  
THERE WILL BE AN ADDITIONAL CHARGE FOR MISSING KEYS AND A REFUELING  
CHARGE WILL BE APPLIED TO ALL EQUIPMENT NOT RETURNED FULL OF FUEL.

ENTERED  
MAR 07 2008

HEATER RENTAL FM  
TERRA HEAT IN THE  
BUILDING

Job Name: MCH  
Job Number: 06-0625  
Cost Code: 01-630  
Authorized by: 1-1  
Date Posted: By:  
Budget:   
Over Budget:

\*ENVIRONMENTAL CHARGE: The items indicated above are subject to an environmental charge which is designed to recover the company's direct and indirect expenses for the handling, managing and disposing of waste products, hazardous materials, and related administrative costs. This is not a government mandated charge.  
FUEL: Fuel charges do not include federal, state or local fuel excise taxes.

OPTIONAL RENTAL PROTECTION PLAN: THE RENTAL PROTECTION PLAN IS NOT INSURANCE! Upon accepting the Optional Rental Protection Plan, the Customer agrees to pay a charge equal to 15% of the rental charges on Equipment Customer wants covered by the Rental Protection Plan, in return, as set out on the back page, United agrees to waive certain claims for accidental damage to such covered Equipment occurring during normal and careful use. Customer remains liable for all damages and loss due to theft listed under The Rental Protection Plan provisions in the Terms and Conditions on back page, including Customer's negligence. Customer Accepts ( ) Customer Declines ( )

READ BEFORE SIGNING: United hereby leases to Customer the Equipment (as defined in the Terms and Conditions on the reverse side) and Customer hereby accepts all TERMS AND CONDITIONS listed in this rental agreement, including the Terms and Conditions set forth on the reverse side, which the undersigned has read and understands. REMINDERS: (1) Rates do not include fuel or delivery; (2) Optional Rental Protection Plan charge is 15% of the total rental charge for covered equipment; (3) Customer pays for all time the Equipment is out, including Saturdays, Sundays and Holidays; (4) This rental agreement supersedes all other purchase orders or terms and conditions contained in any of Customer's agreements or forms; (5) Customer assumes all risk and is responsible for all damages and other costs, including late charges. Details of the above as well as other obligations and responsibilities are contained in the TERMS AND CONDITIONS ON REVERSE. THE INDIVIDUAL SIGNING BELOW AS OR ON BEHALF OF CUSTOMER: (1) AGREES TO ALL OF THE TERMS AND CONDITIONS ON THE REVERSE SIDE OF THIS RENTAL AGREEMENT, (2) ACKNOWLEDGES RECEIPT OF THE EQUIPMENT IN GOOD WORKING ORDER AND, (3) IS FULLY FAMILIAR WITH ITS OPERATION AND USE.

X  
CUSTOMER SIGNATURE DATE NAME PRINTED DELIVERED BY DATE

A LARGER FONT COPY OF THE TERMS AND CONDITIONS IS AVAILABLE UPON REQUEST.

CM010032

006079

# Tates Rents - Meridian

401 N. Main  
Meridian, ID 83642  
www.tatesrents.com

208-888-7368 phone  
208-888-2847 fax



Status: Closed  
Contract #: 35029  
Date Out: Thu 2/21/2008 11:01AM  
Operator: CHRISTINA GATES

PETRA, INC.  
1097 N ROSARIO PLACE  
MERIDIAN, ID 83642

Customer # 3958  
208 323-4500 FAX 208 323-1147

Terms: On Account  
Picked up By: SCOTT TREPAGNIER

PO #: 80005

Job #: 060675 MCH

Qty	Key	Items Rented	Status	Returned Date	Rental Fee
1	7412#5485 005	PUMP SUBMERSIBLE 2" ELECTRIC	Returned	2/21/08 12:47pm	\$25.50
2	1298-5	DISCHARGE HOSE 2"	Returned	2/21/08 12:47pm	\$5.00

Remit payment to: PO Box 7338, Boise, ID 83707

Contract Signature

Date: 2/21/2008 11:01AM

Modification # 1

*PUMP RENTAL - PUMP OUT WATER COLLECTED  
IN THE ELEVATOR PIT*

*WINSTON CONDITIONS*

Job Name: *MCH*  
Job Number: *06-0675*  
Cost Code: *01-630*  
Authorized by: *[Signature]*  
Date Posted: \_\_\_\_\_ By: \_\_\_\_\_  
Budget: \_\_\_\_\_  
Over Budget: \_\_\_\_\_

ENTERED  
MAR 07 2008

## RENTAL CONTRACT

### EQUIPMENT PROTECTION PLAN

EQUIPMENT PROTECTION PLAN IS NOT INSURANCE.

For an additional fee of 12% of the total rental, Lessor agrees to waive certain claims for accidental damage to equipment upon terms and conditions specified on reverse. Equipment Protection Plan does not cover fire damage.

ACCEPT: \_\_\_\_\_

DECLINE: \_\_\_\_\_

A finance charge of 1.75% per month (Annual Percentage Rate of 21%) may be assessed against overdue accounts. LESSEE (OR ITS AGENT) HAS READ THE ENTIRE EQUIPMENT LEASE, INCLUDING TERMS AND CONDITIONS ON REVERSE, OR HAS CHOSEN NOT TO SO READ, AND IN EITHER EVENT ACCEPTS AND SHALL BE BOUND BY THE SAME.

I EITHER KNOW HOW TO PROPERLY OPERATE THE EQUIPMENT LISTED ON THIS EQUIPMENT LEASE OR HAVE ASKED, RECEIVED, AND UNDERSTAND THE INSTRUCTIONS PROVIDED TO ME REGARDING PROPER OPERATION OF THE EQUIPMENT LISTED ABOVE. I ALSO ACKNOWLEDGE THAT TATES RENTS, INC. HAS PROVIDED A COPY OF THIS AGREEMENT TO ME.

SIGNATURE: *Scott*

PETRA, INC.

Rental:	\$30.50
EPP:	\$0.00
Sales:	\$0.00
Delivery Charge:	\$0.00
Misc. Charges:	\$0.00
Subtotal:	\$30.50
Idaho Sales Tax:	\$1.83
TOTAL:	\$32.33
PAID:	\$0.00
AMOUNT DUE:	\$32.33





6428 Business Way • Boise, Idaho 83716 • Phone 208.343.5423 • FAX 208.343.5446  
1312 Alder Ave. • Lehi, Idaho 83501 • Phone 208.743.8596 • FAX 208.743.8597  
250 Mission Street • Nampa, Idaho 83638 • Phone 208.634.5355 • FAX 208.634.2993  
2046 A 4th Street East • Twin Falls, Idaho 83301 • Phone 208.734.4329 • FAX 208.734.0439

FABRICATING CORP.

PROUD TO BE PARTNERS IN SAFETY WITH OSHA.

MAR 06 2008  
\*\*\*\*\* INVOICE \*\*\*\*\*

PAGE: 1

PETRA INCORPORATED  
1097 N. Rosario Pl.  
Meridian

ID 83642

INVOICE NUMBER: 0038380-IN  
P. O. NUMBER:  
INVOICE DATE: 02/29/08  
JOB NUMBER: 0005209  
CUSTOMER NO: 00-PETRA

CONTACT:

JOB DESC: MERIDIAN CITY HALL TEMP HEAT  
COMMENT:

BILL METHOD: TIME & MATERIAL

ORIGINAL CONTRACT AMOUNT: .00  
TAXABLE AMOUNT: 2,450.00  
NON-TAXABLE AMOUNT: .00  
AMOUNT BILLABLE THIS INVOICE: 2,450.00  
INVOICE TOTAL: 2,450.00

*CARBON & MATERIALS TO DUCT THE TEMP  
HEAT INTO THE BUILDING.*

*Temp Heat - Winston Condo*

Job Name: *McA*  
Job Number: *06-0675*  
Cost Code: *01-630*  
Authorized by: *[Signature]*  
Date Posted: \_\_\_\_\_ By: \_\_\_\_\_  
Budget: \_\_\_\_\_  
Over Budget: \_\_\_\_\_

ENTERED  
MAR 12 2008

CM010034

006081



TO: PETRA  
MERIDAIN CITY HALL TEMP HEAT

<u>DATE</u>	<u>HOURS</u>	<u>AMOUNT</u>
1/2/2008	22	\$1,100.00
2/4/2008	17	\$ 850.00
2/6/2008	10	\$ 500.00
	<hr/> 49	<hr/> \$2,450.00

CM010035

006082



Faxed

PROUD TO BE PARTNERS IN SAFETY WITH OSHA.

FABRICATING, CORP.

6428 Business Way • Boise, Idaho 83716-0550 • Phone 343-5423 • FAX 343-5446

1312 Alder Ave. • Lewiston, Idaho 83501 • Phone 743-8596 • FAX 743-8597

## Change Order Authorization

Date: 1-2-08

Job Name: MCH Temp. Heat

Customer Name: Perra Inc.

Hobson C/O #: \_\_\_\_\_

Hobson Job #: 5209

Description of Work: Install Temp heat

Pat Clover - 2 hrs

Scott Westfall - 8 hrs

Cody Evans - 8 hrs

Steve Anderson - 4 hrs.

Materials

4-22" 90° Elbows

30'-22" spiral pipe

2-8" dampers

### BILLING SUMMARY

Material Total: ~~525~~

Sales Tax: \_\_\_\_\_

Labor Total: \_\_\_\_\_

Overhead: \_\_\_\_\_

Subcontract: \_\_\_\_\_

Profit: \_\_\_\_\_

Total: ~~525~~

[Signature]  
Authorized Signature

Steve Anderson  
Printed Name

White Copy: Hobson Office

Yellow Copy: Customer Field

Pink Copy: Hobson Foreman

CM010036

006083



PROUD TO BE PARTNERS IN SAFETY WITH OSHA.

FABRICATING, CORP.

6428 Business Way • Boise, Idaho 83716-0550 • Phone 343-5423 • FAX 343-5446

1312 Alder Ave. • Lewiston, Idaho 83501 • Phone 743-8598 • FAX 743-8597

## Change Order Authorization

Date: 2-4-08

Job Name: MCH Temp. Heat

Customer Name: Perra Inc.

Hobson C/O #: \_\_\_\_\_

Hobson Job #: 5209

Description of Work: Install Temp. heat

Pat Clover - 2 hrs  
Tim Crawford - 5 hrs  
Cody Evans - 5 hrs  
Steve Anderson - 5 hrs

### Materials

1- 20" x 90" Elbow  
1- 24" x 90" Elbow  
1- 40" x 34" 90" Elbow  
1- 28" x 21" 90" Elbow  
30' - 24" spiral

### BILLING SUMMARY

Material Total: \_\_\_\_\_

Sales Tax: \_\_\_\_\_

Labor Total: \_\_\_\_\_

Overhead: \_\_\_\_\_

Subcontract: \_\_\_\_\_

Profit: \_\_\_\_\_

Total: \_\_\_\_\_

Authorized Signature

Printed Name

White Copy: Hobson Office

Yellow Copy: Customer Field

Pink Copy: Hobson Foreman

CM010037

006084



PROUD TO BE PARTNERS IN SAFETY WITH OSHA.

FABRICATING, CORP.

6428 Business Way • Boise, Idaho 83716-0550 • Phone 343-5423 • FAX 343-5446

1312 Alder Ave. • Lewiston, Idaho 83501 • Phone 743-8596 • FAX 743-8597

## Change Order Authorization

Date: 2-6-08

Job Name: MCH Temp Heat

Customer Name: \_\_\_\_\_

Hobson C/O #: \_\_\_\_\_

Hobson Job #: 5209

Description of Work: Install Temp heat

Pat Clover - 2 hrs.

Tim Crawford - 4 hrs.

Cody Evans - 4 hrs.

### BILLING SUMMARY

Material Total: \_\_\_\_\_

Sales Tax: \_\_\_\_\_

Labor Total: \_\_\_\_\_

Overhead: \_\_\_\_\_

Subcontract: \_\_\_\_\_

Profit: \_\_\_\_\_

Total: \_\_\_\_\_

  
Authorized Signature

2-7-08  
Printed Name

White Copy: Hobson Office

Yellow Copy: Customer Field

Pink Copy: Hobson Foreman

CM010038

006085



**Meridian City Hall**  
Meridian, Idaho  
28-Aug-07

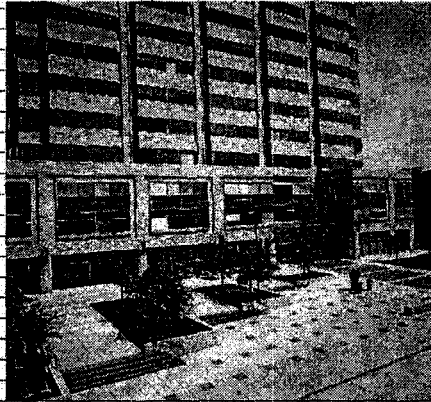


INCLUDED ELEMENTS		2005	2006	2007	2008	2009	2010
1	Conceptual Budget \$0,000 SF @ \$153.50/SF	\$12,200,000					
2							
3	Phase I - Building Demolition & Abatement						
4	Demolition & Abatement of Creamery Structures	Incl	\$426,357	\$426,357	\$426,357	\$426,357	\$426,357
5	Contaminated Soil Abatement						\$0
6	Total Phase I Building Demolition & Abatement		\$426,357	\$426,357	\$426,357	\$426,357	\$426,357
7							
8	Phase II - Core & Shell						
9	Sitework & Utilities		\$347,128	\$347,127	\$610,314	\$610,314	\$610,314
10	Structural Concrete		\$804,415	\$804,415	\$635,395	\$635,395	\$635,395
11	Masonry		\$2,017,345	\$1,065,428	\$1,584,780	\$1,584,780	\$1,584,780
12	Structural Steel		\$1,416,690	\$1,363,718	\$1,847,000	\$1,847,000	\$1,847,000
13	Rough Carpentry		\$93,461	\$12,121	\$0	\$0	\$0
14	Insulation & Waterproofing		\$33,424	\$33,424	\$67,182	\$67,182	\$67,182
15	Roofing & Sheetmetal		\$378,003	\$109,510	\$182,990	\$182,990	\$182,990
16	Exterior Doors		\$38,800	\$27,560	\$7,820	\$7,820	\$7,820
17	Storefronts & Curtnwal		\$329,128	\$329,128	\$295,321	\$295,321	\$295,321
18	Shaftwall Framing & Drywall		\$287,894	\$287,894	\$363,287	\$363,287	\$363,287
19	Elevator		\$156,875	\$156,875	\$222,100	\$222,100	\$222,100
20	Total Phase II Core & Shell		\$5,475,941	\$4,528,791	\$5,436,348	\$5,436,348	\$5,436,348
21							
22	Phase III - T&E/P						
23	Architectural Metalwork		\$4,725	\$49,688	\$49,689	\$73,265	\$73,265
24	Carpentry-Framing, Backing		\$0	\$0	\$0	\$112,000	\$112,000
25	Cabinetry & Casework		\$121,076	\$168,758	\$168,758	\$464,000	\$464,000
26	Insulation & Waterproofing		\$35,799	\$43,799	\$43,799	\$0	\$72,368
27	Interior Doors		\$123,360	\$155,650	\$155,650	\$277,230	\$277,230
28	Interior Storefront		\$0	\$0	\$0	\$68,678	\$68,678
29	Colling Overhead Doors/Screens		\$0	\$0	\$0	\$5,590	\$5,590
30	Interior Gypsum Drywall Systems		\$306,771	\$592,200	\$592,200	\$1,038,550	\$1,038,550
31	Ceramic Tile		\$65,760	\$65,760	\$65,760	\$110,953	\$110,953
32	Resilient Flooring		\$205,330	\$302,322	\$302,322	\$182,354	\$182,354
33	Paint & Wallcoverings		\$80,185	\$125,370	\$125,370	\$151,275	\$151,275
34	Speedsters		\$21,825	\$48,825	\$48,825	\$110,000	\$110,000
35	Operable Partitions		\$0	\$15,000	\$15,000	\$20,640	\$20,640
36	Access Flooring		\$467,253	\$739,318	\$739,318	\$328,000	\$328,000
37	Window Coverings		\$0	\$16,100	\$16,100	\$11,800	\$11,800
38	Fire Suppression Systems		\$308,674	\$1,451,804	\$451,757	\$412,879	\$412,879
39	Plumbing		\$536,373	\$470,000	\$1,282,000	\$953,385	\$953,385
40	HVAC		\$2,251,468	\$2,150,000	\$2,150,000	\$2,050,000	\$2,050,000
41	Electrical		\$2,073,710	\$2,373,349	\$2,320,248	\$2,748,895	\$2,748,895
42	Total Phase III T&E/P		\$7,305,943	\$12,514,542	\$12,717,713	\$14,331,244	\$14,331,244
43							
44	Phase IV - Plaza, Landscaping & Site Improvements						
45	Sitework & Utilities		\$290,227				
46	AC Paving		\$90,161				
47	Concrete Paving		\$311,314				
48	Landscaping		\$306,291				
49	Structural Concrete		\$8,709				
50	Masonry		\$9,776				
51	Steel Fabrications		\$23,820				
52	Framing Carpentry		\$32,800				
53	Roofing, Insulation & Waterproofing		\$11,722				
54	Doors, Frames & Hardware		\$1,500				
55	Interior Walls & Parting		\$5,169				
56	Specialties		\$4,650				
57	Mechanical		\$116,820				
58	Electrical		\$65,000				
59	Total Phase IV - Plaza, Landscaping & Site Improvements		\$1,298,559	\$1,500,000	\$1,500,000	\$1,500,000	\$1,500,000
60							
61	FF&E Provided By Others						
62	Demountable Walls (Options to \$1.163 Million)		\$0	\$465,910	\$465,910	\$0	\$0
63	Audio Visual Systems		\$0	\$0	\$0	\$215,500	\$205,776
64	Telecommunication Systems		\$0	\$0	\$0	\$225,000	\$219,000
65	Security Systems		\$0	\$0	\$0	\$165,000	\$165,000
66	Phone Service & Equipment Provider						
67	Interior Signage Package						\$25,000
68	Total FF&E		\$0	\$465,910	\$465,910	\$605,500	\$565,776
69							
70	General Conditions & Fees						
71	Project Reimbursable Cost Allowances		\$279,812	\$279,812	\$279,812	\$279,812	\$279,812
72	Phase II General Conditions		\$181,029	\$181,029	\$181,029	\$181,029	\$181,029
73	Phase III General Conditions		\$181,029	\$181,029	\$181,029	\$181,029	\$181,029
74	Construction Contingency Allowance		\$700,000	\$0	\$825,861	\$835,848	\$700,000
75	Estimated LEED Certification Costs for Silver		\$0	\$0	\$0	\$205,000	\$205,000
76	Estimated Value Engineering Allowance		\$0	\$0	-\$812,353	\$0	\$0
77	Contract CM Fee		\$574,000	\$574,000	\$574,000	\$574,000	\$574,000
78	CM Fee Covered Adjustment for Change in Project Scale					\$51,653	\$365,413
79	Total General Conditions & Fees		\$1,915,870	\$1,215,870	\$1,229,378	\$2,256,518	\$2,172,528
80	Total Project Direct Costs		\$12,200,000	\$16,620,370	\$17,548,870	\$18,185,309	\$19,964,330
81	Potential Value Engineering Savings						\$19,397,787
82							\$632,416.00
83							\$18,365,351

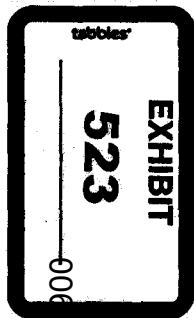
EXHIBIT

522

	A	B	C	D	E	F	G	H	I	J
1										
2										
3										
4			<b>Meridian City Hall Project</b>							
5										
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**Building Program**



	A	B	C	D	E
1	Meridian City Hall	Department:	Entry Functions		
2					
3			NO. OF 2025		
4	SPACE	SPACES STD.	SPACES	TOTAL NSF	REMARKS
5	Entrance Vestibule	200	1	200	
6	Lobby/Gathering	450	1	450	Information Desk & Kiosk
7	Public Restrooms	450	1	450	
8	Multi-purpose Room	1000	1	1000	
9					
10					
11					
12					
13	TOTAL NET SQUARE FEET (NSF)			2100	
14					
15	TOTAL DEPT. GROSS SQUARE FEET (x 1.25)			2625	

880900

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	A	B	C	D	E
1	Meridian City Hall	Department:	Building Support		
2					
3			NO OF 2025		
4	SPACE	SPACES STD.	SPACES	TOTAL NSF	REMARKS
5	General Receiving w/dock	300	1	300	
6	General Building Support/Storage	300	1	300	
7	Janitors Closets 3 within bldg.	50	3	150	
8	Computer/Telephone Room	200	1	200	
9	Mail/Processing/Supply Room	120	1	120	
10	Network/Telecom Closet	100	4	400	Must be one on each floor - This assumes 4 floors.
11	Building Services	8000	1	8000	mech., elec., gen. storage, elevators
12					
13	E.O.C. Room/Training Room	400	1	400	to be in basement
14					
15					
16	TOTAL NET SQUARE FEET (NSF)			9870	
17					
18	TOTAL DEPT. GROSS SQUARE FEET (x 1.25)			12338	

680900



	A	B	C	D	E	F
1	Meridian City Hall Department:		Mayor & City Council	Tammy De Weerd		
2						
3		Existing Staff		NO OF 2025		
4	SPACE	Positions 2006	SPACES STD.	SPACES	TOTAL NSF	REMARKS
5	Mayor	1	400	1	400	Office, conf. area
6	Exec. Admin. Assist.	1	125	1	125	
7	Admin. Assist./Waiting		500	1	500	Intern work space
8	Receptionist/Scheduler		100	1	100	
9	Economic Development	2	140	2	280	Office
10	Communications		125	1	125	
11	Youth Programs	1	125	1	125	could be in H/R Area
12	Council Chambers(conf. Room and Offices)		3000	1	3000	Anticipate 9 council seats/seating for 150-200 (flex)
13	Council Workroom		600	1	600	
14	Conference (10-15)		250	1	250	Executive Session/Pre-Council/share with City Adm.
15	Conference (6-8)		120	1	120	Share with City Adm.
16	Storage		200	1	200	
17		5				
18						
19					5825	
20						
21					7281	

060900

	A	B	C	D	E	F
1	Meridian City Hall	Department:	City Administration	Will Berg		
2						
3		Existing Staff		NO OF 2025		
4	SPACE	Positions 2006	SPACES STD.	SPACES	TOTAL NSF	REMARKS
5	City Clerk	1	225	1	225	Office, small conference area, closet/file, cabinets
6	Deputy Clerks	2	150	2	300	Office
7	Department Specialist	3	125	4	500	
8	Reception	1	300	1	300	includes waiting area and kiosks for terminale
9	Work Room		400	1	400	files, postage, closet
10	Record Storage		500	1	500	
11	Library/Conference		225	1	225	Attorney space requirement
12	Archived Storage		400	1	400	basement
13	Records Examination Area		150	1	150	
14	Conference Room		300	0	0	Share with Mayor's Office
15						
16						
17						
18	TOTAL NET SQUARE FEET (NSF)				3000	
19						
20	TOTAL DEPT. GROSS SQUARE FEET (x 1.25)				3750	

	A	B	C	D	E	F	G
1	Meridian City Hall	Department:	Financial Management			Stacy Kilchenmann	
2							
3		Existing Staff		NO OF 2025			
4	SPACE	Positions 2006	SPACES STD.	SPACES	TOTAL NSF	REMARKS	
5	CFO	1	225	1	225	Office	
6	Accounting Manager	1	150	1	150	Office	
7	Accountant	1	125	3	375		
8	Grant Specialist		100	1	100		
9	Printers		50	2	100		
10	Accounting Specialist	2	100	4	400		
11	Purchasing Manager	1	150	1	150	Office	
12	Purchasing/Admin. Asst.		100	1	100		
13	Billing/Cash Manager	1	150	1	150	Office	
14	Supervisor	1	100	2	200	if we are going to have central receipting area for all payments need to plan for that.	
15	Billing	4	100	3	300	Remember to leave room in common areas for printers - file cabinets.	
16	Cashier		100	5	500		
17	Need Lobby Area/Counter		400	1	400		
18	Vault		100	1	100		
19	File Room		500	1	500		
20	Work Room		250	1	250	fax, copier, counter, cabinets	
21	Conference (6-8)		250	1	250		
22		12					
23							
24				TOTAL NET SQUARE FEET (NSF)	4250		
25							
26				TOTAL DEPT. GROSS SQUARE FEET (x 1.25)	5313		

	A	B	C	D	E	F
1	Meridian City Hall	Department:	City Attorney & Human Resources		Bill Nary	
2						
3		Existing Staff		NO OF 2025		
4	SPACE	Positions 2006	SPACES STD.	SPACES	TOTAL NSF	REMARKS
5	City Attorney/HR Director	1	225	1	225	Office
6	Deputy Attorneys	2	125	5	625	Offices
7	Paralegal/legal Secretary	1	100	3	300	
8	Paralegal and/or legal Secretary		100	2	200	
9	Human Resources Specialist	1	100	1	100	Office
10	Human Resources Analyst	1	150	1	150	Office
11	Human Resources Analyst		100	2	200	Office
12	Clerical	1	100	2	200	
13	Intern Work Space		100	1	100	
14	File Storage		500	1	500	Combined space (attorney/hr)
15	Conference (6-8)		160	1	160	
16	Conference (10-15)/Library		250	1	250	
17	Training Area		200	1	200	Can be shared space
18						
19						
20		7				
21						
22	TOTAL NET SQUARE FEET (NSF)				3210	
23						
24	TOTAL DEPT. GROSS SQUARE FEET (x 1.25)				4013	

006093

	A	B	C	D	E	F
1	Meridian City Hall	Department:	Information Technology			Terry Patemoster
2						
3		Existing Staff		NO OF 2025		
4	SPACE	Positions 2006	SPACES STD.	SPACES	TOTAL NSF	REMARKS
5	Director	1	225	1	225	Office
6	Development/Programming Manager		125	1	125	
7	Systems Network Manager		125	1	125	
8	Programmers	1	125	5	625	
9	Programmers (Future)		125	4	500	
10	Network Support	2	125	5	625	
11	Network Support (Future)		125	3	375	
12		4				
13						
14	Shared Work Room (Fax, copier)		200	1	200	
15	Server Room		400	1	400	Temperature controlled with Access Floor
16	Computer Staging Area		500	1	500	
17	Conference Room		300	1	300	
18	Training Lab		300	1	300	
19	File Room		120	1	120	
20						
21			TOTAL NET SQUARE FEET (NSF)		4420	
22						
23			TOTAL DEPT. GROSS SQUARE FEET (x 1.25)		5525	

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	A	B	C	D	E	F
1	Meridian City Hall Department:		Planning			Anna Borchers Canning
2						
3		Existing Staff		NO OF 2025		
4	SPACE	Positions 2006	SPACES STD.	SPACES	TOTAL NSF	REMARKS
5	Planning Directory/Zoning Admin.	1	225	1	225	Office with wall space and conference area
6	Administrative Assistant	1	400	1	400	Includes waiting/reception area
7	Receptionist		100	1	100	
8	Library/File Management		100	1	100	
9	Planning Intern	1	50	1	50	desk, computer and phone
10		3				
11	Current Planning Division					
12	Manager	1	150	1	150	Office (Wall space)
13	Principal Planner		150	1	150	Office (Wall space)
14	Associate Planners	3	125	4	500	Office (Wall space)
15	Assistant Planners	2	100	3	300	Office (Wall space)
16	Associate (Front Counter)		125	1	125	
17	Assistant (Building Permit Review)		100	1	100	
18	Counter/Assembly Area		115	1	115	
19		6				
20	Other Current Planning Considerations					
21	Design Review Staff					
22	Principal	1	150	1	150	Office (Wall space)
23	Associate	0	125	1	125	
24	Associate (Needed if Commission)	0	125	1	125	
25		1				
26	Comprehensive Planning Division					
27	Manager	1	150	1	150	Office (Wall space)
28	Principal		250	1	150	
29	Associates	1	150	2	300	
30		2				
31	Other Considerations		250	1	250	
32	Community Development Services Director				225	Office
33	Historic Preservation Associate	0	125	1	125	
34	Affordable Housing Associate	0	125	1	125	
35	Other Community Development Assoc.	0	125	1	125	
36	Transportation	0	125	1	125	
37						
38		12				
39						
40						
41			TOTAL NET SQUARE FEET (NSF)		4290	
42						
43			TOTAL DEPT. GROSS SQUARE FEET (x 1.25)		5363	

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CM002840

	A	B	C	D	E	F
1	Meridian City Hall	Department:	Public Works & Building Dept.			Brad Watson
2						
3		Existing Staff		NO OF 2025		
4	SPACE	Positions 2006	SPACES STD.	SPACES	TOTAL NSF	REMARKS
5	Administration					
6	Public Works Director	1	225	1	225	Office
7	City Engineer	1	180	1	180	Office
8	Exec. Assistant	1	125	1	125	
9	Environmental Planner		125	1	125	
10	Community Relations		125	1	125	
11	Graphics Design/Web Tech		125	1	125	
12	Safety Director		125	1	125	
13	Dept. Spec. Supervisor	1	400	1	400	Includes front counter
14	Dept. Spec. Engineering	2	100	2	200	
15	P/T Dept. Spec. Engineering		100	1	100	
16		6				
17	Engineering Division					
18	Asst. City Engineer		150	1	150	Office
19	Staff Engineer	3	150	4	600	
20	P/T Staff Engineer	1	125	1	125	
21	Engineering Tech. III		125	1	125	
22	Engineering Tech. II		125	2	250	
23	Engineering Tech. I	1	125	1	125	
24	Project Site Representative	1	125	1	125	
25	GIS Manager	1	150	1	150	
26	GIS Analyst	1	125	1	125	
27	GIS Tech		125	2	250	
28	SCADA Tech		125	1	125	
29	Streetlight Coord.		100	1	100	
30	Streetlight Tech.		100	1	100	
31		8				
32	Plan Review					
33	Development Svcs. Mgr.	1	150	1	150	Office
34	Development Svcs. Coord.	1	125	1	125	
35	Development Analyst II	2	125	2	250	
36	Development Analyst I	1	125	2	250	
37		5				

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CM002841

	A	B	C	D	E	F
38	Bldg./Permit					
39	Dept. Spec Bldg. Permit Clerk	2	100	2	200	
40	Senior Dept. Spec. Bldg.	1	100	1	100	
41	P/T Dept Spec. Bldg.		100	1	100	
42	Bldg. Coord.	1			0	
43	Building Official	1	125	1	125	
44	Building Inspector	2	125	2	250	
45	Trade Inspectors	12	60	14	840	Space divided into 3 to 4 shared spaces.
46	Fire Code Inspector	1	125	1	125	
47	Fire Code Inspector		60	1	60	
48		20				
49	Inspectors - 1 Hr. Day					
50	Sewer/Water Inspector II	2	125	2	250	
51	Sewer/Water Inspector I	2	125	4	500	
52		4				
53		43				
54	Support Spaces					
55	Conference Room/Training		400	1	400	
56	Conference Room		125	2	250	
57	Plan Vault/Building		300	1	300	
58	Plan Vault/Engineer		200	1	200	
59	GIS Server Room		100	1	100	
60	Building Support Space		300	1	300	
61	File Storage Engineer		300	1	200	
62	File Storage Building/Permitting				200	
63	Engineer Library		200	1	200	
64	Engineering Support Space		500	1	500	
65	Coffee Bar/Sink		30	1	30	
66	Break Room		0	0	0	See Public/Lobby/Support for 2005-2025
67						
68	TOTAL NET SQUARE FEET (NSF)				10085	
69						
70	TOTAL DEPT. GROSS SQUARE FEET (x 1.25)				12606	

006097



A		B	C	D	E	F
1	Meridian City Hall	Department:	Parks & Recreation			Doug Strong
2						
3		Existing Staff		NO OF 2025		
4	SPACE	Positions 2006	SPACES STD.	SPACES	TOTAL NSF	REMARKS
5	Director	1	225	1	225	Office
6	Administrative Assistant	1	125	1	125	
7	Parks Superintendent	1	150	1	150	
8	Recreation Superintendent	1	150	1	150	
9	Recreation Supervisor	1	120	1	120	
10	Recreation Coordinator		100	1	100	
11	Office Assistant	1	200	1	200	includes waiting/reception
12	Office Assistant		100	1	100	
13	Intern		100	1	100	
14	Park Planner		125	1	125	
15	Work Room		150	1	150	
16	Storage Plan/Review		200	1	200	
17	Conference Room (6-8)		160	1	160	
18						
19		\$				
20						
21	TOTAL NET SQUARE FEET (NSF)				1905	
22						
23	TOTAL DEPT. GROSS SQUARE FEET (x 1.25)				2381	

	A	B	C	D	E	F
1	Meridian City Hall	Department:	Fire Administration			Chief Ron Anderson
2						
3		Existing Staff		NO OF 2025		
4	SPACE	Positions 2006	SPACES STD.	SPACES	TOTAL NSF	REMARKS
5	Fire Chief	1	225	1	225	Office - Needs Privacy/meeting table for 4
6	Deputy Chief - Training	1	150	1	150	Office
7	Deputy Chief - Prevention	1	150	1	150	Office - Needs Privacy (1 to have space to review plans)
8	Deputy Chief - EMS	1	150	1	150	Office
9	Fire Inspector	1	150	2	300	
10	Training Officer		200	1	200	Storage for tapes, equipment, library
11	Battalion Chief		150	1	150	
12	Public Education	1	150	1	150	
13	Administrative Assistant/Reception	1	200	1	200	includes reception/work area.
14	Administrative Assistant		100	1	150	
15	Clerical	1	100	1	150	
16	Shower Facilities		250	1	250	Men's & Women's for clean up after response
17	File/Storage		150	1	150	
18	Conference Room (15-20)		300	1	300	
19	Coffee Bar		30	1	30	With sink
20		8				
21						
22						
23					2705	
24					3381	

660900

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CM002844

	A	B	C	D	E
1	Meridian City Hall	Department:	Historical Society		
2					
3				NO OF 2025	
4	SPACE	SPACES STD.	SPACES	TOTAL NSF	REMARKS
5	Display Area	500	1	500	
6	Office/Patron Area	300	1	300	
7	Storage	1500	1	1500	
8					
9					
10				TOTAL NET SQUARE FEET (NSF)	2300
11					
12				TOTAL DEPT. GROSS SQUARE FEET (x 1.25)	2875

	A	B	C	D	E
1	Meridian City Hall	Department: Ada County			
2					
3			NO OF 2025		
4	SPACE	SPACES STD.	SPACES	TOTAL NSF	REMARKS
5	Motor Vehicles	0	1	0	
6					
7					
8					
9					
10	TOTAL NET SQUARE FEET (NSF)			0	
11					
12	TOTAL DEPT. GROSS SQUARE FEET (x 1.25)			0	

006101

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CM002846

	A	B	C	D	E
1	Meridian City Hall	Department: Valley Ride			
2					
3			NO OF 2025		
4	SPACE	SPACES STD.	SPACES	TOTAL NSF	REMARKS
5	Valleyride	0	1	0	
6					
7					
8					
9					
10	TOTAL NET SQUARE FEET (NSF)			0	
11					
12	TOTAL DEPT. GROSS SQUARE FEET (x 1.25)			0	

006102

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CM002847

	A	B	C	D	E
1	Meridian City Hall	Department:	Staff Support		
2					
3			NO OF 2025		
4	SPACE	SPACES STD.	SPACES	TOTAL NSF	REMARKS
5	Staff Restrooms	250	2	500	Men and Women with Lockers
6	Staff Breakroom & Showers	300	1	300	Cabinets, vending, Sink
7					
8					
9					
10	TOTAL NET SQUARE FEET (NSF)			800	
11					
12	TOTAL DEPT. GROSS SQUARE FEET (x 1.25)			1000	

006103

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CM002848

	A	B	C
1	Meridian City Hall	Summary	
2			
3		NO OF 2025	
4	SPACE	Total GSF	REMARKS
5	Entry Function	2625	
6	Building Support	12338	
7	Mayor & Council	7281	
8	City Administration	3750	
9	Finance	5313	
10	City Attorney & HR	4013	
11	Information Technology	5525	
12	Planning	5363	
13	Public Works & Building	12806	
14	Parks & Recreation	2381	
15	Fire Administration	3381	
16	Historical Society	2875	
17	Ada County	0	
18	Valleyride	0	
19	Staff Support	1000	
20	Total	67450	
21			
22			
23			
24			
25			
26			
27			
28			
29			
30	TOTAL GROSS SQUARE FEET (GSF)		
31			
32			



## GENERAL CONTRACTORS & CONSTRUCTION MANAGEMENT

November 5, 2007

Via: Hand Delivery

Mr. Keith Watts, Purchasing Agent  
City of Meridian  
33 E Idaho St.  
Meridian, ID 83642

RE: Notice of Intent to submit formal Change Order Request.

Keith:

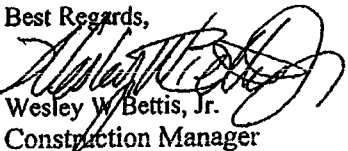
This letter is a Notice of Intent for Petra Incorporated to submit a formal Change Order Request to the City of Meridian for additional Construction Management Fee and additional Project Engineer compensation in accordance with the terms and conditions of the Construction Management Agreement between the City of Meridian and Petra Incorporated for the Meridian City Hall project.

In accordance with Article 7 (b) of the "Agreement Between Owner and Construction Manager", Petra is requesting additional Construction Management Fee for significant changes to the project size, complexity and budget. The project size has increased from 80,000 SF to 100,000 SF with a full basement. The corresponding budget has increased from \$12.2 Million to a current estimate of \$ 19.6 Million, which does not include the site development costs of contaminated and unsuitable soil removal, replacement with structural fill material and the associated CM Fee to manage this site preparation scope of work. The contract CM fee was based on \$ 12.2 Million at 4.7%. The additional fee is based on the difference of contract values, \$ 7.4 Million at 4.7% with a Phase IV-Plaza & Site Improvements budget of \$1.5 Million or a total fee increase of \$347,800.00

Additionally, in accordance with Article 7 (b), as noted above, the construction Manager is requesting additional reimbursable expenses for the Project engineer due to the increased size, complexity and budget in the Project that requires additional man hours for the Project engineer on the project from the contract of 64 hours/month for 18 months to 94 hours/month for the final 12 months of the project. This reflects an additional 10 hours/month for 12 months at the contract rate of \$45.90/hour. or \$ 5,508.00.

No additional general condition reimbursable or temporary expenses will be requested as a part of this Change Order Request, as the scheduled completion date is still within the contract timeline and no additional expenses will be incurred as a part of this change. A formal Change Order Request will be forwarded once Phase IV—Plaza and Site Improvements bids the end of this month and a final construction budget is developed.

Best Regards,

  
Wesley W. Bettis, Jr.  
Construction Manager



## EXHIBIT 525

**SHOWING THAT PETRA'S FEES FOR ADDITIONAL SERVICES  
AND REIMBURSABLE COSTS ASSOCIATED WITH CHANGE  
ORDER NO. 2 OCCURRED AFTER THE NOVEMBER 5, 2007  
NOTIFICATION OF INTENT TO SUBMIT CHANGE ORDER NO. 2**

<b>November 5, 2007</b>	<p><b>Petra's notification to the City of Meridian of Petra's <i>Intent to Submit Change Order No. 2</i> for additional Construction Manager's fee due to the change in design, size and complexity of the Project.</b></p> <p><b>The amount of the original change order No. 2 was 4.7% fee on the additional project cost.</b></p> <p><b>Notification for Change Order No. 2 was given prior to the additional costs being incurred as per C.M.A. Total costs to date at the end of November 2007 was only \$8.3 million.</b></p>
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# Rating Sheet for Architects & Construction Managers for Meridian City Hall Project

CONSTRUCTION MANAGEMENT	Freeman	Brown	Davis	Nesbit	Klein	Warwick	Wilson	Watson	Bird	DeWeerd	TOTAL	AVERAGE
Petra General Contractors	93	99	92	90		88	81	88	94	99	824	91.6
CM Company	96	85	80	97		87	89	88	100	94	816	90.7
Kreizenbeck Constructors	95	83	79	98		87	91	88	100	93	814	90.4
Benilton Construction Co.	98	79	73	87		78	89	84	94	85	767	85.2
Heery International	86	82	92	87		83	86	86	74	84	760	84.4
Ewing Company	92	59	55	72		87	98	91	100	83	737	81.9
Layton Construction Co.	85	46	71	86		82	94	67	87	74	692	76.9
CSDI Company	66	50	70	77		79	79	71	82	78	652	72.4
JW Construction	86	69	68	49		69	85	40	100	62	628	69.8
Knothe-Zior-Casali Construction	43	37	54	70		60	73	71	77	65	550	61.1
ARCHITECTURAL SERVICES	Freeman	Brown	Davis	Nesbit	Klein	Warwick	Wilson	Watson	Bird	DeWeerd	TOTAL	AVERAGE
ZGA Architects	93	96	94	84		85	98	83	96	89	818	90.9
CSHQA	88	96	76	91		93	100	69	100	88	801	89.0
Lombard/Conrad Architects	90	76	80	95		79	100	86	100	92	798	88.7
Cole + Poe Architects	92	81	78	95		84	98	72	79	87	766	85.1
Trout Architects	72	70	73	87		77	100	82	94	82	737	81.9
BRS Architects	89	82	77	81		59	99	68	100	76	731	81.2
Design West Architects	64	78	64	85		83	100	83	84	76	717	79.7

EXHIBIT

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Rating Sheet

Page 1

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PAGE 03/03

006107 Petra62581

May 4, 2006

**City of Meridian  
City Hall Building Committee**

	A	B	C	D
1	<b>Name</b>	<b>Telephone Number</b>	<b>Business</b>	<b>E-Mail</b>
2	Mark Freeman	888-9111	Foley, Freeman, Borton PLLC, Attorneys	<a href="mailto:mfreeman@foleyfreeman.com">mfreeman@foleyfreeman.com</a>
3	Mike Brown	880-2397	Brown Construction	<a href="mailto:brownc@meridiacity.org">brownc@meridiacity.org</a>
4	Arden Davis	388-2404 / 866-6521	Idaho Power Company	<a href="mailto:ardendavis@idahopower.com">ardendavis@idahopower.com</a>
5	Rich Nesbit	249-2355	Realty Executives of Treasure Valley	<a href="mailto:rich@richnesbit.com">rich@richnesbit.com</a>
6	Chris Klein	888-7342	Edward Jones	<a href="mailto:chris.klein@edwardjones.com">chris.klein@edwardjones.com</a>
7	Rex Warwick	331-7208 / 331-7394	Blue Cross of Idaho	<a href="mailto:rwarwick@bcidaho.com">rwarwick@bcidaho.com</a>
8	Deneen Wilson	884-3050	KeyBank	<a href="mailto:deneen_m_wilson@keybank">deneen_m_wilson@keybank</a>
9				
10	Keith Bird	888-2108	City Council Member	<a href="mailto:birdk@meridiacity.org">birdk@meridiacity.org</a>
11	Tammy de Weerd	888-4433	Mayor	<a href="mailto:deweerdtd@meridiacity.org">deweerdtd@meridiacity.org</a>
12				
13	Brad Watson	898-5500	Public Works Director	<a href="mailto:watsonb@meridiacity.org">watsonb@meridiacity.org</a>
14	Ted Baird	898-5506	Deputy City Attorney	<a href="mailto:bairdt@meridiacity.org">bairdt@meridiacity.org</a>
15	Will Berg	888-4433	City Clerk	<a href="mailto:bergw@meridiacity.org">bergw@meridiacity.org</a>
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21				
22				



1097 N. Rosario Street, Meridian, ID 83642 Phone (208)323-4500 Fax (208)323-4507

Date: March 12, 2008

To: Keith Watts, Purchasing Manger, City Of Meridian

From: Tom Coughlin, Project Manager

Re: Rule Steel – Time Extension & Liquidated Damages

In an attempt to address the time extensions that Rule Steel has requested for various ASI's and RFI's issued to-date Petra Inc. has reviewed the requests and the actual scenario involving the progress of their work.

Petra had previously informed Rule Steel that they would be assessed liquidated damages starting on 11/26/07 if the entire structural steel scope of work of was not completed by that date. It is Petra's opinion that the steel scope of work was not substantial complete until 2/08/08. This date represents the date that Petra feels the structural steel was completed to a point so as not to impede any of critical path follow-on work required to complete and/or dry-in the building. This period amounts to 75 calendar days. The period of time that Rule Steel would be assessed liquidated damages for would be the 75 days minus any time extensions granted for the various ASI's & RFI's that have impacted the structural steel scope of work.

Rule Steel had previously requested a total of 27 days for the items that were included in Rule's CO#01. This request was held in abeyance pending the completion of the work.

For the items previously included in CO #01:

- ASI-7 Lower Floor Structure at 1<sup>st</sup> Floor– Time requested 5 days. OK to recommend to the City.
- ASI-8 Steel Connection Modifications – Time requested 10 days. OK to recommend to the City.
- ASI-18 Add Camber & Revise Moment Connections – Time requested 5 days. OK to recommend to the City.
- ASI-19 Connection Fix for Bsmt Wall to Low – Time requested 2 days. Not recommended, didn't impact the progress of the work.
- ASI-23 Stair Tower Support Steel – Time requested 5 days. OK to recommend to the City.

This is totals to 25 of the 27 work days requested.

For the items pending change order submittal:

- ASI-13 Elevator Tube Upgrade – Time requested 10 days. Not recommended, this work was done after the substantial completion date.
- ASI-52 Elevator Penthouse Beams – Time requested 10 days. Would recommend 5 days.
- ASI-54 Roof Elevation & Slope @ CMU Wall – Time requested 3 days. OK to recommend.
- RFI-73 Sun Shade Connection – Time requested 3 days. Not recommended, did not impact the progress of the work.
- RFI-74 Angle Clips for Support of Wall – Time requested 3 days. Not recommended, did not impact the progress of the work. As of Friday, 3/7/07 these clips had not been installed.
- Bent Plate @Grid H (Included with RFI-74) – Add bent plate, shop drawings marked incorrectly. Time requested 5 days. OK to recommend to the City.

EXHIBIT

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- RFI-93 Relief Angle @ Stair Towers – Time requested 5 days. Not recommended, did not impact the work. This was for furnishing only.
- RFI-94 Furnish and install two chiller beams. Time requested 5 days. Not recommended, did not impact the work. This was issued and accomplished after the base building work on the critical path was completed.

The time for these pending changes that Petra can recommend to the City would be 13 work days.

The total time extension, considering both the CO#01 items and the new items, that Petra would propose to recommend is 38 days work days, which translates to 52 calendar days. The 52 calendar days represent a time extension that Petra feels would be fair and responsible to both Rule Steel and the City. Based on this Rule Steel would still be liable for liquidated damages for a period of 23 calendar days based on a substantial completion date for their work of 2/8/08. The total cost for these 23 days at \$500/Day would be \$ 11,500.

Please review this scenario and let me know if this line of reasoning is acceptable to the City. If this is acceptable Petra will propose this to Rule as settlement of the matter of the schedule delays and the time extensions requested for the various delays. Currently Petra has not approached Rule with proposal regarding their time extension requests.

April 3, 2007

Mr. Ted W. Baird  
Deputy City Attorney  
City of Meridian  
33 East Idaho  
Meridian, Idaho 83642

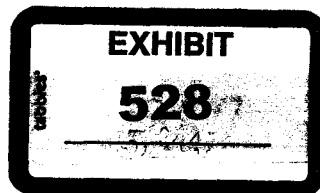
Re: Performance Concerns  
New City Hall Project

Dear Ted:

As requested, the following is our response to your concerns outlined in your letter of March 30, 2007. This response is intended to be constructive and informative so that the relationship between Petra and the City of Meridian would remain positive and produce a project all parties can take pride in.

1. Project Staffing and Diligence – Petra has constantly worked to bring the Architect and multiple Owner representatives for the City together in a positive atmosphere. At no time have we shirked responsibility and in fact have gone beyond our scope of services to help the City. Currently Petra has five personnel and support staff working on the Meridian City Hall Project. In response to your specific questions we offer the following:

- a) Irrigation Ditch - The necessity of having the irrigation service operational was identified by Petra last November. Over a month ago, we noted that the delay in design decisions would require a temporary irrigation pipe ahead of the formal bids. During the week of March 26<sup>th</sup>, the contaminated soil removal to the south was sufficiently defined to allow irrigation line installation. On Monday March 26<sup>th</sup> Petra presented the temporary irrigation line solution. Petra was not aware that a one week notice for a purchase order would cause frustration on the part of the City. Since that time we have turned the temporary pipe into a permanent installation which will be completed by 4-15-07.
- b) Topo Surveyor – In CM contracts the parties responsible for securing a surveyor for topo and boundary survey is the City or the Architect. Once Petra learned that neither the City nor the Architect had secured a surveyor for this design scope of work, Petra began working with the City to solicit pre-qualified bidders for the work. After two weeks of no success in finding a Surveyor that had the time to work this project into their schedule, the City Engineer's office was solicited for additional names of Surveyors under annual contract with the City that the City would consider having work on this project. Four names were provided and a firm was found and retained for the City Hall work to perform the boundary and topo survey as soon as the site was ready with no delay to the project. An acceptable backup firm was in place should the first firm not be able to perform.
- c) Delay in Bid Documents - Boiler plate for bid documents consist of the contract (which is produced by the City), and the bid package descriptions. The bid package descriptions are created after the plans and specifications are developed. When asked for the bid packages, the City was provided with the outlines that were created for this project and it was noted at that time



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that outlines were being provided until the plans and specifications were delivered to Petra by the design team. The design team provided the plans and specs on schedule and the bid packages were updated and submitted to the City approximately one week later, within the project schedule. The bid documents were not delayed.

- d) **Improper Staff Substitution** - The project staff outlined in the construction management services proposal of August 2006 and transferred into the contract language was based on a project start date provided by the City at that time. When the unforeseen conditions of contaminated soil were realized, Petra brought in Jon Anderson. Jon was superintendent on a \$33 Million Tamarack development where he had worked with EPA and IDEQ issues, and is one of a few superintendents in the entire Valley that can manage this unforeseen cleanup to a successful conclusion. The finish foreman will be identified and submitted to the City, when the final schedule is established.
- 2. **Poor Management of Demolition Contractor** - The Demolition Contractor has received public praise from the Mayor and Council for the work that they performed at over \$80,000 in savings over the next lowest bid. The demolition contractor took precautions to protect the 3 identified well heads by covering them with fill material prior to demolition. The fourth well was not found until after the demolition was complete and there never was a casing above grade at this location. In demolishing concrete / brick structures and falling a 185' chimney, it is reasonable to assume that some surface damage will occur in spite of being covered with fill. At the same time, the demolition contractor has some responsibility for the 3 damaged casings. The letter on March 30<sup>th</sup> is the first time Petra has been notified of the dollar value for the damages incurred and we will handle this with the City's Representative in our weekly production meeting.
  - 3. **Improper Management of Contaminated Soil Removal** - The sequence of events concerning the contaminated soil issue are as follows:
    - a) In January, Terracon drilled an exploratory well for groundwater design which they characterized as containing contaminated soil. They stopped and moved to another location. They ended-up drilling two more wells and pulled water samples from them and had them tested for contamination migration into the ground water, which proved negative. The City was kept notified throughout this process.
    - b) Petra contacted MTI, to provide a proposal for dealing with contaminated soils. MTI pulled a sample of dirt tested the contents in their lab for general results and noted that it was mildly contaminated, confirming the Terracon report. Petra then contacted MTI and asked for full labs, identifying the exact contaminants and their handling requirements and made the appropriate recommendations to the City.
    - c) With the test results in hand, Petra confirmed with the licensed abatement contractor that a registered landfill in Ada County would take and remediate the contaminated soil and log the removal site with the EPA. The Brownsfield Survey data information number was provided to the landfill for their use. This is how all contaminated materials are required to be handled per the EPA guidelines. Dual notification was also required with IDEQ, and was made by MTI after the initial hauling had begun. MTI filed a work plan and notification with IDEQ who acknowledged that the work would be performed under the existing Brownsfield Survey for the property, that we had correctly documented the removal, transport and deposit of contaminated soils, the EPA had been correctly notified of the project and then thanked us for inviting them to the site and working with them to get all of the paper work in place.

- d) There is not an additional permit required by IDEQ and at no time has the City been at risk for a tremendous environmental liability due to the actions of MTI, Ideal Demolition, or Petra. In fact, the actions of the Petra and Abatement team have gone beyond traditional contractual relationships to insure that every precaution and good practice has been taken to mitigate an unforeseen environmental liability.

In closing, it is Petra's observation that the City's frustration with "communication" and "inordinate amount of time tracking and managing issues" stems from the organizational format setup by the City. Over the past 14 years on previous CM projects that I have worked on, there has been one Owner's representative to work with and to report to. Currently you have that person in Brad Watson. I sincerely believe that Brad, Steve Simmons, and myself can bring this project to the successful conclusion desired by all parties.

Sincerely,

Eugene R. Bennett  
Construction Manager





**April 1, 2007**

**Mr. Will Berg**  
City Clerk  
33 East Idaho Avenue  
Meridian, Idaho 83642-2300

Re: **MERIDAIN CITY HALL - BUILDING OPTIONS**  
**LCA NO. 06016.01** File Code 4-a

**Dear Will:**

As discussed last Friday, there appears to be a substantial amount of anguish over which direction the City should take with regards to the basement and ground water issue. Although there may be others being discussed that I am not aware of, I believe the options available are fairly limited due to the current status of the project. I would like to recap the more obvious options being discussed and their individual merits.

1. **Leave the project as designed:** A substantial amount of time and energy has been expended to get the projects to the point it is today. Now that the amount of ground water that must potentially be removed from around the basement has been determined, the various approvals from the governing agencies stand in the way. Our civil engineer has been informed that the approval process could take somewhere around 45-60 days once a design is submitted. To date, he has not been given the approval to proceed with this work. The project excavation would be delayed until all approvals are obtained. If they are denied, then an alternative solution for the building and basement would need to be determined. Currently the shell package is being bid on April 3<sup>rd</sup> and a building permit is not in hand. It would be prudent to allow Petra to gather the bid amounts as planned and compare the actual bid amounts to the projected budget. The results could force a new direction anyway and assist with a decision.
2. **Delete the basement:** Based on the latest budget prepared by Petra, the project is still over the original budget of twelve million dollars. By deleting the basement, there would be approximately 1.3 million dollars saved. Not all of the savings would be realized however as the existing mechanical room, electrical room, locker rooms and Clerks storage areas would have to be relocated either to other levels or added to the south end of the first floor. It is estimated that the net savings would be around 700-800 thousand dollars depending on the final solution. As suggested by Petra, the steel package for the main building shell could be salvaged and modifications to the south end or basement could be handled with the supplier at a later date. This insures our place in the manufacturing process. The design team would need approximately 30 days to redesign the building at an approximate cost of \$ 35 thousand dollars. The redesigned building foundation package would then need to be re-bid.





Mr. Will Berg  
City of Meridian  
Page 2

3. **Raise the building above ground water levels:** Based on the current design, the basement floor slab is projected to be approximately at ground water level. As you know the water level can fluctuate up to 3 feet according to the geotechnical report. The preferred elevation of the basement floor would need to be supplied by the geotechnical engineer. The current finish floor level of the first floor slab is somewhat dictated by Broadway Avenue as the sidewalk abuts the building. If the first floor elevation is raised 4 feet higher, additional stairs would need to be added and ramps into the building for accessibility would need to be extended approximately 48 feet. That could be an aesthetic challenge but not insurmountable. I would be concerned about the interface of the buildings north side and Broadway Avenue. This would need to be discussed with Meridian Planning for compatibility with the "Old Town" district and the desired image. There would be minimal impact to the building shell design other than the transition at ramps, stairs and loading docks. Those alterations could be handled within the site package with a design extension of three weeks. Construction costs are not known at this time and design fees should not be a substantial amount.
4. **Deleting the basement and plan for a future forth floor:** Refer to item 2 for discussion regarding the deletion of the basement. We admit that planning for an additional floor to be added at some future time sounds appealing, in reality it rarely happens. Designers cannot predict how building and seismic codes will change over an undefined period of time. The third floor occupants may not be able to occupy the building during construction while the roof is removed. The current designed mechanical system would have to be modified as it would be enclosed by occupied space. It is more practical to build the shell from the onset, which can be finished when needed. The space could even be finished now and if desired, be leased out to other agencies until needed by the City. The savings gained by deleting the basement should offset a substantial amount, but not all of the cost of adding an additional floor. Petra could better determine the impact. As this is virtually a redesign of the entire building, design time would be approximately 6 weeks with and additional cost up to 50 thousand dollars.

In summary, I believe that there are two main questions that need to be answered. What exactly is the overall project budget and what is driving such an accelerated design and construction schedule? A fixed project budget will determine the building's spatial program and the quality of construction. The construction climate will force hard decisions to be made in the name of fiscal responsibility. If however the current project scope meets the desired program and the budget is feasible, then why not start the agency review process as soon as possible to determine if the ground water can be removed as desired.

As you can see, there are many variables and numerous options. In closing it is our recommendation that either Option 1 or 3 be considered due to the current status of the project.

Sincerely,

LCA ARCHITECTS, P.A.

Steven M. Simmons AIA

# **Request for Statements of Qualifications:**

## **Meridian City Hall**

### **Construction Management Services**



**APRIL 06, 2006**

04/06/06



PETRA97106

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**Request for Statements of Qualifications  
Construction Management Services  
For  
Meridian City Hall**

The City of Meridian is soliciting statements of qualifications and performance data from interested persons or firms to provide construction management services for the design, bidding, site demolition, and construction of a new approximately 80,000 square foot Meridian City Hall to be located on an approximately 2 acre site located at the southeast corner of Meridian Road and Broadway Avenue, Meridian, Idaho. The project budget has not been set, and the project architect is currently being selected.

The construction management services must be provided under the direct supervision of a Construction Manager licensed in the State of Idaho, and firms must hold a Certificate of Authority to provide Construction Management Services in the State of Idaho. The person or firm hired for this project will be selected on the basis of qualifications and demonstrated competence, and the contract for construction management services for the City Hall project will be negotiated at prices that are fair and reasonable given the estimated value of the project, and the nature, scope, and complexity of the construction management services to be provided.

Sealed Statements of Qualification must be received until, and no later than, 4:00 PM, on Monday, April 24, 2006. Submittals must be mailed or delivered to the office of the City Clerk, Meridian City Hall, 33 E. Idaho Ave., Meridian, Idaho 83642. All submittals must be marked "Meridian City Hall-CM Statement of Qualifications". Late submissions will not be accepted.

The City of Meridian reserves the right to reject any and or all submittals and to waive informalities.

The Construction Manager (CM) will provide services for a flat fee or a percentage of total construction cost, not to exceed a certain construction price. The CM will have total responsibility under the contract to coordinate, direct, supervise and manage the project. The CM will publicly bid all subcontracts, for the City, assure that all-applicable laws and regulations are complied with and that all necessary records are complied with. The CM will not directly provide labor, materials or equipment for the project construction. The CM's insurer will be required to name the City of Meridian as an additional named insured on all required coverages. All subcontractors will be required to be insured and provide performance and payment bonds for each contracts scope of work.

It is anticipated that the work of the project will involve multiple bid packages. During the design phase the CM will also provide value analysis, scheduling, cost estimating, constructability and phasing assistance.

## **INSTRUCTIONS TO RESPONDENTS**

Each submittal must follow the outline below and be signed by an officer or owner of the company. Eight (8) copies of the submittal must be furnished. Brochures, photos, financial statements, annual reports not specifically requested may be appended to the back of each submittal. Selection criteria and scoring is set forth at the end of this request for submittals.

## **SUBMITTAL FORMAT**

Submittals must be typed or printed on 8-1/2" x 11" paper. Emphasis should be placed on the specific qualifications of the people who will actually perform the work and their approach to this specific project. To assist in the evaluation, it is desirable to format the submittal similar to the headings listed below.

### **1. Overall Construction Experience**

Give a brief description of your company history and its capabilities.

Are you a licensed Construction Manager in the State of Idaho? What is your bonding capability?

Summarize current projects and status.

Provide historical data on the separate dollar volume on commercial and public building contracts and the number of such contracts in each calendar year.

### **2. Relevant Construction Experience**

Provide a general statement regarding knowledge and experience with the construction of similar facilities and in particular, describe your experience with the Construction Management process, demolition, pre-construction services, scheduling, value analysis, constructability reviews, cost estimating and phasing.

List Similar Projects beginning with the most recent first. Provide the following information.

1. Brief description, location, and scope.
2. Date of completion.
3. Initial construction budget.
4. Final cost of the project.
5. Total dollar amount of change orders.
6. Construction period.

### **3. Subcontractor Relations**

**Explain how you will bid work to be preformed under subcontracts.  
What techniques will be used to coordinate the work of different subcontractors performing different divisions of work?**

**How will the City be protected from delay claims from subcontractors?**

**What program will be used to assure subcontractor compliance with OSHA rules, tax, and social security withholding rules?**

**Describe the CM's role in establishing and maintaining a job site safety program and quality control program.**

**Familiarity with the local labor and subcontracting market.**

### **4. City/Contractor Relations**

**List references for recent significant and similar construction projects. Indicate type of contract for each construction project (I.E. CM, public bid, negotiated, cost plus, etc.).**

**Set forth a history of litigation and arbitration regarding previous contracts. Include claims made, or litigation or arbitration threatened even though no formal lawsuit or arbitration proceeding was filed. Include actions brought by Owners, your firm, subcontractors, and third parties. This request also includes any challenges to process or procedures made by the proposed construction manager against any public entity in relationship to a project. Give the amount contested and paid, if any, for each case and a brief description of the issue. Include the names of the attorneys involved for any of the parties, case number or arbitration number, as applicable, and any other relevant information pertaining to these claims.**

**Provide as a reference all architectural firms with which you have worked as a Construction Manager or as an Owners Representative in the last five years.**

### **5. Administrative Capacity and Proposed Personnel**

**Identify key participants with names, resumes, qualifications, and relevant experience. Please also indicate a percentage of their time to be allocated to this project and include a listing of their current project responsibilities.**

**Describe your approach to planning, phasing and scheduling the project.**

**Describe how you will monitor the work and maintain the project schedule.**

**Describe the scheduling method proposed.**

**Describe the project record keeping system. Include methodology for coordinating and accomplishing inspections, testing, and final closeout.**

**Describe proposed methodology and approach to value engineering.**

**Describe project manuals to be delivered to City at completion of the project.**

**Describe proposed format for weekly CM and Subcontractors meetings and monthly City, CM, and Architect meetings.**

#### **6. Managing Cost**

**Provide a statement regarding proposed techniques to assure that using your firms approach will result in the project being completed within the budget and for the least overall project cost to the City of Meridian.**

**Provide a statement regarding how unspecified, but necessary and foreseeable, facilities, equipment, fixtures, and parts will be furnished so that the completed facility will be fully operational.**

**Describe warranties to be provided for all facilities and equipment. Set forth call back criteria and cost to City, if any, for emergency callbacks.**

**Describe training of City's personnel provided in basic fee. Identify training items that will be extra cost.**

**Describe how monthly progress billings will be prepared and submitted.**

#### **SELECTION PROCESS**

**The following process will be used for the selection of the Construction Manager:**

- 1. Respondents must submit eight (8) copies of the submittal**
- 2. The selection committee will review, screen and rank the submittals based on the criteria described above. A minimum of three (3) firms, if qualified, will be invited to attend interviews on a date to be announced. Firms selected for interviews will be notified as soon as possible.**
- 3. Based on the submittals, interviews and other information, the selection committee will rate and rank the firms that have been interviewed.**
- 4. The City of Meridian will select a firm with which to negotiate a contract based on the ranking and information supplied by the selection committee. Should**

negotiations prove unsuccessful, a second firm will be selected, and so forth, as necessary.

#### **SCORING OF SUBMITTALS**

1. Overall Construction Experience	20
2. Relevant Project Experience	20
3. Subcontractor Relations	10
4. Owner/Contractor Relations	10
5. Administrative Capabilities and Proposed Personnel	30
6. <u>Managing Cost</u>	<u>10</u>
Total Points	100

#### **LIMITATION**

The cost of the submittals and any related expenses, including travel shall be entirely the responsibility of the respondent.

The City of Meridian reserves the right to reject any or all submittals and to waive informalities.



**PROFESSIONAL SERVICES  
AGREEMENT**  
(ARCHITECTURAL SERVICES)

BETWEEN

**CITY OF MERIDIAN**  
AN IDAHO MUNICIPAL CORPORATION

AND

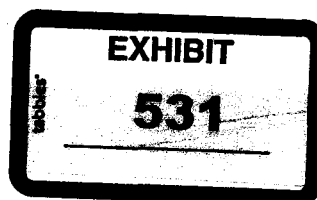
**LCA ARCHITECTS, P.A.**  
AN IDAHO PROFESSIONAL CORPORATION

FOR THE

**NEW MERIDIAN CITY HALL**

DATED

JULY 11, 2006



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PETRA96867

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**PROFESSIONAL SERVICES AGREEMENT  
(Architectural Services)**

THIS PROFESSIONAL SERVICES AGREEMENT (this "Agreement") is made effective the 11th day of July, 2006, by and between CITY OF MERIDIAN, an Idaho municipal corporation ("Owner"), and LCA ARCHITECTS, P.A., an Idaho professional corporation ("Architect").

**RECITALS**

A. Owner is under contract to purchase that certain parcel of land located at 27 E. Broadway, Meridian, Idaho (the "Site").

B. Owner desires to develop a new city hall facility and related improvements on the Site (the "Project").

C. Architect has represented to Owner that it is has the skills, qualifications, and experience to provide professional architectural design and contract administration services for the Project on behalf of Owner.

D. Owner desires to retain Architect, and Architect desires to be retained by Owner, for professional architectural services for the Project on Owner's behalf.

**AGREEMENT**

NOW, THEREFORE, in consideration of the mutual promises, covenants, and agreements stated herein, and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, Owner and Architect agree as follows:

**1. RELATIONSHIP OF THE PARTIES**

**1.1 Relationship of the Parties.**

Architect acknowledges and accepts the relationship of trust and confidence established with Owner by this Agreement and that this relationship is a material consideration for Owner in entering into this Agreement. Accordingly, Architect shall, at all times, act in a manner consistent with this relationship. Architect further covenants that Architect will perform its services under this Agreement, in the exercise of ordinary and reasonable care and with the same degree of professional skill, diligence and judgment as is customary among architects of similar reputation performing work for projects of a size, scope and complexity similar to the Project. Architect shall, at all times, further the interest of Owner through efficient business administration and management.

## **1.2 Authorized Representative.**

Owner and Architect shall designate a representative who shall be authorized to act on that parties' behalf with respect to the Project. Each party's representative shall render decisions in a timely manner in order to avoid unreasonable delay in the progress of the Project. Each party may rely upon the directions and decisions of such representatives as the directions and decisions of the other party. Neither Owner nor Architect shall change its authorized representative without five (5) days prior written notice to the other party.

### **1.2.1 Owner's authorized representative shall be:**

To be determined by Owner. Upon Owner's selection of its authorized representative, Owner will provide Architect the name and contact information for such representative.

### **1.2.2 Architect's authorized representative shall be:**

Steve Simmons, President  
LCA ARCHITECTS, P.A.  
1221 Shoreline Lane  
Boise, Idaho 83702  
Telephone: 208-345-6677  
Facsimile: 208-344-9002  
Mobile: 208-830-4122  
Email: ssimmons1@lcarch.com

## **1.3 Architect as Owner's Representative.**

Architect shall be a representative of Owner during the Project. Architect shall have authority to act on behalf of Owner only to the extent provided in this Agreement, unless otherwise set forth in writing.

## **2. ARCHITECT**

### **2.1 Architect's Representations.**

Architect makes the following express representations and warranties to Owner, which shall survive the execution and delivery of this Agreement:

2.1.1 Architect is or will be professionally qualified to provide architectural services for the Project and is properly licensed to practice architecture by all public entities having jurisdiction over Architect and the Project;

2.1.2 Architect has, or will as part of its services under this Agreement, become familiar with and examined the Site, including, but not limited to, the existing terrain, structures, landscaping and the local conditions under which the Project is to be designed, constructed, and operated, and correlated its observations with the Project's requirements;

2.1.3 Architect has the professional knowledge, skills, experience, education and staffing to design the Project and prepare construction documents for the Project. The individual employees of Architect that will render services pursuant to this Agreement are knowledgeable and experienced in the technical disciplines required for this Project;

2.1.4 Architect shall prepare all documents and provide all services required under this Agreement in such a manner that increases in Project costs resulting from Architect's errors or omissions do not exceed one percent (1%) of the total construction price of the Project; and

2.1.5 Architect assumes full responsibility to Owner for its own improper acts and/or omissions and those employed or retained by Architect in connection with the Project (excluding intentional acts), but not for acts and omissions expressly directed by Owner.

## 2.2 Communications.

Architect shall endeavor to keep Owner fully informed regarding the progress of the Project so Owner can have meaningful review and involvement in the Project. Without limiting the generality of the foregoing sentence, Architect shall, as a matter of course, promptly provide Owner with copies of all designs, documents, meeting notes and memorandum and any other information related to the Project for Owner's review and input. Architect shall notify Owner of any decisions that are required to be made by Owner, and any deadlines pertaining thereto. Architect shall consult with and advise Owner with respect to any such decisions.

## 2.3 Meetings with Governmental Officials.

Architect agrees to provide Owner with reasonable notice of all formal public and non-public meetings with government officials regarding the Project. Owner shall be entitled to attend any formal public or non-public meeting with governmental officials regarding the Project. Architect shall document all meetings with governmental officials related to the Project and any verbal or written interpretations related to the Project provided by any governmental officials.

## 2.4 Project Records.

All records relating to the Project in Architect's possession (the "Project Records") shall be made available to Owner for inspection and copying at a reasonable time and place upon the written request of Owner. The Project Records shall include, but not be limited to, all plans, specifications, submittals, correspondence, minutes, memoranda, receipts, timesheets, electronic recordings and other writings or things that document any aspect of the design and construction of the Project. Architect shall maintain the Project Records for six (6) years after substantial completion of Project or for any longer period required by law.

## 2.5 Value Engineering.

Architect will participate with Construction Manager to informally value engineer the Project to maximize costs savings to Owner through discounts, informal value engineering

and other actions consistent with good design and building practices for a project of the type contemplated by Owner.

## **2.6 Governmental Permits.**

Architect shall assist Owner and Construction Manager in preparing and filing all documents necessary to obtain the approvals of governmental authorities having jurisdiction over the Project, including, but not limited to, building and occupancy permits.

## **2.7 Compliance with Laws.**

Architect shall perform all of Architect's services in compliance with all applicable laws, ordinances, rules, regulations or orders of any public authority having jurisdiction over the Project, any applicable permits and any recorded covenants, conditions and restrictions affecting the Site.

## **2.8 Independent Contractor.**

Architect acknowledges that it is an independent contractor and not an employee or agent of Owner. As an independent contractor, Architect shall be and remain responsible to Owner for all its negligent acts or omissions in connection with its duties and services under this Agreement that result in damage or injury to persons or property. Architect shall indemnify and hold harmless Owner against all claims or liabilities that are asserted, incurred or recovered against Owner related to employer liabilities that arise from Architect's employment or retention of any person or entity. Owner shall have no control over the manner or method by which Architect meets Architect's obligations under this Agreement; provided that Architect's services shall be performed in a competent and efficient manner this is in compliance with this Agreement. Nothing in this Agreement shall be construed to mean that Owner employs or is responsible for compensating any consultant of Architect.

## **2.9 Consultants.**

Architect has engaged the following consultants to provide the indicated services pursuant to this Agreement:

### **Landscape Architecture**

Hatchmueller PC  
611 Sherman Avenue  
Coeur d' Alene, ID 83814  
Telephone: (208) 676-8444  
Facsimile: (208) 676-8555

### **Structural Engineering**

Stapley Engineering, Inc.  
8701 West Hackamore Drive  
Boise, Idaho 83709  
Telephone: (208) 375-8240  
Facsimile: (208) 375-8257

**Mechanical Engineering**

Engineering Incorporated  
2222 Broadway Avenue  
Boise, Idaho 83706  
Telephone: (208) 343-3663  
Facsimile: (208) 343-9625

**Electrical Engineering**

Eidam and Associates  
815 Park Boulevard, Suite 230  
Boise, Idaho 83712-7739.  
Telephone: (208) 345-7127  
Facsimile: (208) 345-7173

Prior to retaining or engaging any additional consultants to provide services pursuant to this Agreement, Architect shall submit for Owner's approval a written statement listing (1) a description of the services to be provided by said consultant (2) a brief description of said consultant's qualifications to render the identified services, and (3) a disclosure of any ownership, controlling interest or affiliation between Architect and said consultant. Owner shall bear no responsibility for reimbursing Architect for services of any consultant retained or engaged by Architect unless Architect first complies with this Section.

**2.10 Indemnification**

To the fullest extent permitted by law, Architect shall indemnify and hold harmless Owner and its officers, directors, agents and employees from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of Architect's duties and responsibilities under this Agreement, but only to the extent caused by the negligent acts or omissions of Architect, its employees, agents or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

**2.11 Outside Compensation Prohibited.**

Except with Owner's knowledge and consent, Architect shall not engage in any activity or accept any employment, interest or contribution that would reasonably appear to compromise Architect's professional judgment with respect to the Project or the relationship of trust between Owner and Architect established herein; provided, however, nothing in this Section shall be deemed to limit Architect's ability to provide services for an competitor of Owner.

**3. OWNER**

**3.1 Owner's Objectives.**

Owner's objective for the Project is to develop a new city hall facility and public plaza on the Site.



### **3.2 Owner's Duties.**

3.2.1 Owner shall, at its expense, furnish Architect with documents in its possession concerning the Site, which documents shall include a legal description, environmental risk assessment, site survey, and preliminary title report.

3.2.2 Owner shall provide Architect with Owner's preliminary planning and programming information regarding Owner's requirements for the Project, including, but not limited to, Owner's purposes, concepts, desires and any design, construction, scheduling, budgetary or operational needs, restrictions or requirements, as the same may be amended from time to time ("Owner's Criteria"). Architect shall be entitled to rely upon such information only to the extent that a reasonably prudent Architect would so rely on such information.

3.2.3 When reasonably requested by Architect, Owner shall furnish, at Owner's expense, the services of professional consultants such as land surveyors, geotechnical engineers, and hazardous materials consultants. Owner shall furnish structural, mechanical, chemical, geotechnical and other laboratory or on-site tests, inspections and reports as set forth in the Construction Documents and as required by law.

3.2.4 Owner shall timely review documents provided by or through Architect;

3.2.5 Owner shall timely render its direction, decision, consent or approval on matters identified by Architect for Owner's direction, decision, consent or approval;

3.2.6 Owner shall provide for all required testing or inspections of the Work as may be mandated by law, the Construction Documents or the Construction Contracts;

3.2.7 If Owner learns of any failure to comply with the Construction Contract by Contractor, or of any errors, omissions, or inconsistencies in the services of Architect, and in the further event that Architect does not have notice of the same, Owner shall inform Architect;

3.2.8 Owner shall afford Architect access to the Site and to the Work as may be reasonably necessary for Architect to properly perform its services under this Agreement;

3.2.9 Owner's review, direction, decision, approval or consent of any document provided or matter identified by or through Architect shall be solely for the purpose of determining whether such document or matter is generally consistent with Owner's Criteria. No review of such documents shall relieve Architect of its responsibility for the accuracy, adequacy, fitness, suitability, or coordination of its services or work product.

3.2.10 Architect shall be entitled to rely upon services and information provided by or through Owner only to the extent that a reasonably prudent Architect would so rely on such services and information. Architect shall promptly notify Owner in writing if

Architect becomes aware of any errors, omissions or inconsistencies in such services or information.

### **3.3 Owner's Construction Manager.**

Owner plans to retain a construction manager ("Construction Manager") to provide construction management services for the Project. Upon Owner's selection of Construction Manager, Owner will provide Architect the name and contact information for Construction Manager's authorized representative. Architect hereby acknowledges that it has received, reviewed, and studied the agreement form that Owner intends to use with Construction Manager (the "CM Agreement"), and the same is herein incorporated by reference. Architect shall consult and coordinate with Construction Manager as needed to fulfill its duties hereunder, and shall assist Construction Manager as need for Construction Manager to fulfill its duties to Owner under the CM Agreement.

### **3.4 Contractor.**

Architect understands that Owner plans to retain multiple prime contractors (the "Contractors") to provide construction labor, services, materials and equipment for the Project (the "Work"). The term "Contractor" means all prime contractors retained by Owner to perform Work, but not the prime contractor's subcontractors, laborers and material suppliers.

## **4. SCOPE OF SERVICES**

### **4.1 In General.**

Owner has retained Architect to help it achieve the objectives set forth in Section 3.1 above by providing design and construction administration services for the Project on behalf of Owner. Therefore, the general scope of Architect's responsibilities is to do all things, or, when appropriate, require Construction Manager and each Contractor to do all things necessary, appropriate or convenient to achieve the end result desired by Owner, including, but not limited to, those tasks set forth in this Article 4. Architect's services shall include all (i) architectural design services, (ii) civil, structural, mechanical, electrical and other engineering services not identified as the responsibility of Owner herein, (iii) landscape design services (including plaza and water feature design), (iv) interior and furnishings design, and (v) phone and data consulting services that are normally and customarily provided to complete a project of the scope, quality and nature of the Project and required to obtain the approval of governmental authorities having jurisdiction over the Project. The tasks set forth in this Article 4 are not intended to be an exhaustive list of the tasks required to achieve the result desired by Owner. The general scope of Architect's responsibilities and shall include all other tasks indicated or implied in this Agreement and the implementing plans contemplated herein.

### **4.2 Development Strategies Phase.**

Architect shall carefully examine Owner's Criteria and consult with Owner and Construction Manager in detail about the same in detail. Based on its review and consultations, and with the assistance of Construction Manager, Architect shall prepare and submit to Owner a written report detailing its understanding of Owner's Criteria and identifying any design,

construction, scheduling, budgetary, operational or other problems or recommendations that may result from Owner's Criteria. The written report shall also include proposed solutions addressing each problem identified, alternative strategies for the cost effective design and construction of the Project, and alternative strategies for the cost effective future expansion of the Project. Architect shall assist Construction Manager in developing the preliminary project schedule required pursuant to Section 4.2 of the CM Agreement.

#### 4.3 Preliminary Design Phase.

4.3.1 After reviewing Architect's written report and Construction Manager's written report with Owner and Construction Manager, and reaching agreement upon proposed alternatives and solutions, Architect shall, within the time frames set forth in the preliminary project schedule developed pursuant to Section 4.2 of the CM Agreement and in cooperation with Construction Manager's efforts, prepare and submit to Owner a preliminary design for the Project (the "Preliminary Design"), which shall be consistent with Owner's Criteria and shall include:

(a) A site plan that depicts each of the basic aspects of the site development for the Project including, but not necessarily limited to, the size, location, and dimensions of each structure;

(b) Elevations that depict each exterior view of each structure;

(c) Floor plans that depict each room within the Project and the dimensions thereof;

(d) Preliminary specifications, together with preliminary plans architectural, electrical, mechanical, structural, engineering, and, if relevant, o systems to be incorporated in the Project;

(e) A written description of the equipment and materials to specified for the Project and the location of same; and

(f) Any other documents or things necessary or appropriate to describe and depict the Project and illustrate the conformity of the same with Owner's Criteria.

4.3.2 Owner shall timely review and approve or disapprove the Preliminary Design. If Owner disapproves the Preliminary Design, Owner shall set forth the reasons therefor in writing. Architect shall then revise the Preliminary Design as required by the reasons for disapproval and resubmit the revised Preliminary Design to Owner for approval, which approval shall not be unreasonably withheld or delayed. This process shall repeat until Owner approves the Preliminary Design.

4.3.3 Architect shall assist Construction Manager in the preparation of the documents required under Section 4.4.1 of CM Agreement.

4.3.4 ~~If the Preliminary Price Estimate developed pursuant to Section 4.4.1(f) of the CM Agreement exceeds the Project Budget developed pursuant to Section 4.4.1(c) of the CM Agreement, Owner may require Architect, at no cost to Owner, to (i) consult with Owner and Construction Manager to identify cost saving measures and (ii) revise the Preliminary Design to reflect approved cost savings measures, as necessary to bring the Final Cost Estimate below the Maximum Price. Absent clear and convincing evidence of gross negligence, and provided Architect completes its obligations under this Section, Architect shall not be financially responsible to Owner for the failure of the Preliminary Cost Estimate to be within the Project Budget.~~

NO FIDELITY

4.3.5 Prior to directing Architect to proceed with Construction Documents, Owner may establish and communicate the maximum price Owner desires to pay for the construction of the Project (the "Maximum Price").

#### 4.4 Construction Documents Phase.

4.4.1 Upon Owner's approval of the Preliminary Design and authorization to proceed with Construction Documents, Architect shall, within the time frames set forth in the Project Schedule, prepare and submit to Owner construction documents for the Project (the "Construction Documents"). The Construction Documents shall be consistent with the Preliminary Design (as modified) and the Maximum Price. The Construction Documents shall include, but not necessarily be limited to, plans and specifications that describe with specificity all systems, elements, details, components, materials, equipment, and other information necessary for construction. The Construction Documents shall be accurate, complete, coordinated and in all respects adequate for the bidding and construction of the Project on a fixed-price, multi-prime contractor basis. The Construction Documents shall also comply with all applicable law, codes, regulations and orders of governmental authorities having jurisdiction over the Project. All products, equipment and materials specified shall be readily available in the area unless otherwise directed by Owner in writing.

4.4.2 To the extent deemed necessary or appropriate by Architect, Owner shall retain an experienced, qualified geotechnical engineer at Owner's expense to evaluate the geotechnical considerations relating to the Site and Project. Architect shall design and engineer the Project in accordance with the analyses and recommendations of the geotechnical engineer.

4.4.3 Owner shall review and approve or disapprove the Construction Documents. If Owner disapproves the Construction Documents, Owner shall set forth the reasons therefor in writing. Architect shall then revise the Construction Documents as required by the reasons for disapproval and resubmit the revised Construction Documents to Owner for approval, which approval shall not be unreasonably withheld or delayed. This process shall repeat until Owner approves the Construction Documents.

4.4.4 If the Final Cost Estimate exceeds the Maximum Price, Owner may require Architect, at no cost to Owner, to (i) consult with Owner and Construction Manager to identify cost saving measures and (ii) revise the Construction Documents to reflect approved cost savings measures, as necessary to bring the Final Cost Estimate below the Maximum Price.

Absent clear and convincing evidence of gross negligence, and provided Architect completes its obligations under this Section, Architect shall not be financially responsible to Owner for the failure of the Final Cost Estimate to be within the Maximum Price.

#### **4.5 Bidding Phase.**

4.5.1 Architect, following Owner's approval of the Construction Documents, shall assist Owner and Construction Manager in preparing bid packages and reviewing bids for construction.

4.5.2 If the combined lowest bids from qualified bidders exceeds the Maximum Price, Owner may require Architect, at no cost to Owner and as necessary to bring bids for the Project below the Maximum Price (i) to consult with Owner and Construction Manager to identify cost saving measures, (ii) to revise the Construction Documents to reflect approved cost savings measures, and (iii) to assist Owner and Construction Manager in rebidding the Work. Absent clear and convincing evidence of gross negligence, and provided Architect completes its obligations under this Section, Architect shall not be financially responsible for the failure of the Project to bid within the Maximum Price.

#### **4.6 Construction Phase.**

During construction of the Project, from commencement of construction activities until final payment to all Contractors, Architect shall have and perform the following duties, obligations, and responsibilities:

4.6.1 Architect shall have and perform those duties, obligations and responsibilities set forth in the construction agreements between Owner and each Contractor (the "Construction Contracts"). Architect hereby acknowledges that it has received, reviewed, and studied a form that Owner intends to use for the Construction Contracts, and the same is herein incorporated by reference. Architect acknowledges that Owner may modify the Construction Contracts, and that such modified Construction Contracts shall be applicable to this Agreement; provided, however, to the extent such modified Construction Contracts are materially inconsistent with the terms of this Agreement, this Agreement shall control as between Owner and Architect.

4.6.2 Architect shall, as contemplated herein and in the Construction Contract, but not otherwise, act on behalf, and be the agent, of Owner throughout construction of the Project. Any instructions, directions or other communications from Architect to any Contractor shall be given to Contractor through Construction Manager. Architect shall copy Construction Manager on any communications to Owner.

4.6.3 Upon receipt, Architect shall carefully review and examine the each Contractor's schedule of values ("Schedule of Values"), together with any supporting documentation or data that Owner, Architect or Construction Manager may require. The purpose of such review and examination shall be to protect Owner from an unbalanced Schedule of Values that allocates greater value to certain elements of the Work than is indicated by such supporting documentation or data, or than is reasonable under the circumstances. If the Schedule of Values is not found to be appropriate, or if the supporting documentation or data is deemed to

be inadequate, and unless Owner directs Architect to the contrary in writing, the Schedule of Values shall be returned to Contractor for revision or supporting documentation or data. After making such examination, if the Schedule of Values is found to be appropriate as submitted, or if necessary, as revised, Architect shall sign the Schedule of Values thereby indicating its informed belief that the Schedule of Values constitutes a reasonable, balanced basis for payment of the Contract Price to Contractor. Architect shall not sign such Schedule of Values in the absence of such belief unless directed to do so, in writing, by Owner.

4.6.4 Architect shall promptly examine, study, approve or otherwise respond to each Contractor's shop drawings and other submittals. Architect's approval of such submittal shall constitute Architect's representation to Owner that such submittal is in general conformance with the Construction Documents.

4.6.5 Architect shall carefully observe the work of Contractor whenever, wherever, and as often as necessary, and shall, at a minimum, observe work at the Project site no less frequently than every two weeks. The purpose of such observations shall be to determine the quality and quantity of the work in comparison with the requirements of the Construction Contract. In making such observations, Architect shall help Owner identify, and attempt to protect Owner from, continuing deficient or defective work, from continuing unexcused delays in the schedule and from overpayment to Contractor. Following each observation, Architect shall submit a written report of such observation to Owner and Construction Manager together with any appropriate comments or recommendations.

4.6.6 Architect shall promptly notify Owner and Construction Manager of Work that is not in compliance with the Construction Documents, and timely recommend, in writing, the rejection of any Work that is not in compliance with the Construction Documents, unless otherwise directed by Owner in writing.

4.6.7 Architect shall require inspections and testing (and, if necessary, reinspections and retesting) of the Work where required by law or the Construction Documents.

4.6.8 Architect shall review periodic and final payment requests from Contractors predicated upon observations of the Work, as required in Section 4.6.5 above, and evaluations of Contractor's rate of progress in light of the Project Schedule. Architect shall issue payment approvals to Owner only if, and to the extent, Architect has observed the Work as pursuant to Section 4.6.5 above and that the Work for which payment is approved (i) reaches the quantities or percentages of completion shown, (ii) meets or exceeds the requirements of the Construction Documents, and (iii) Owner is obligated to pay the amount approved to such Contractor under the terms and conditions of the Construction Contract.

4.6.9 Architect shall promptly respond to requests for information and issues clarifications for any errors, omissions, conflicts or inconsistencies in the Contract Documents.

4.6.10 Architect shall promptly examine requests for change orders and advise Owner and Construction Manager regarding such requests. Upon Owner's request,

Architect shall draft Change Orders and supporting specifications, drawings, and other documentation in accordance with the Construction Contracts.

4.6.11 Based upon inspections of the Project, Architect shall certify in writing to Owner the fact that, and the date upon which, each Contractor achieves Substantial Completion of the Project and the date upon which Contractor has achieves Final Completion of the Project.

4.6.12 Architect shall review any as-built drawings furnished by Contractor and shall certify to Owner that such drawings are adequate and complete.

4.6.13 Architect shall assist Construction Manager in creating organized binders with all manuals, operating instructions, warranties, guarantees and other similar items required by the Construction Documents. Architect shall retain a set of such binders in its Project file.

4.6.14 Architect shall promptly correct any errors, omissions, inconsistencies or deficiencies in Architect's services or work product.

4.6.15 Architect shall promptly notify Owner of any claim filed by any Contractor and shall provide Owner with a timely written response to such claim.

4.6.16 Architect shall testify in any judicial proceeding concerning the design and construction of the Project, when requested in writing by Owner, and Architect shall make available to Owner any personnel or consultants employed or retained by Architect for the Project when necessary to review, study, analyze or investigate any claims, contentions, allegations, or legal actions relating to, or arising out of, the design or construction of the Project.

## **5. SCHEDULE**

### **5.1 Schedule of Performance.**

Architect shall commence the performance of its obligations under this Agreement upon Owner's notice to proceed and shall diligently and expeditiously continue its performance in accordance with the Project Schedule until all services hereunder have been fully completed. The time limits established by the Project Schedule are of the essence and shall not be exceeded by Architect without Owner's prior written consent or as permitted in Section 5.2 below.

### **5.2 Delays.**

If Architect is delayed at any time in progress of its services under this Agreement by an act or neglect of Owner, or an employee of Owner, or of a separate contractor employed by Owner, or by changes in its scope of work, unavoidable casualties, or other causes beyond Architect's reasonable control or by other causes which Owner determines may justify the delay, then the Project Schedule equitably adjusted for such reasonable time as Owner may determine to be appropriate for the extent of the delay. Architect's sole right and remedy against Owner shall be an extension of time unless such delay is caused by acts of Owner constituting active

interference with Architect's performance, and only to the extent such acts continue after Architect furnishes Owner with written notice of such interference. In the event of delay from active interference by Owner, Architect's sole right and remedy shall be an equitable adjustment in its compensation pursuant to Article 7 below.

## **6. COMPENSATION**

### **6.1 Architect's Fee.**

As full compensation for Architect's performance under this Agreement, Owner agrees to pay Architect a fee of Eight Hundred Fifty-four Thousand and No/100ths Dollars (\$854,000.00) (the "Architect's Fee"). For purposes of progress payments, Architect's compensation shall be divided into the following phases:

Development Strategies Phase	Ten Percent	(10%)
Preliminary Design Phase	Twenty Percent	(20%)
Construction Documents Phase	Forty Percent	(40%)
Bidding Phase	Five Percent	( 5%)
Construction Phase	Twenty-five Percent	(25%)

### **6.2 Compensation for Additional Services.**

If the services of Architect are changed as described in Article 7 below, Architect's Fee shall be adjusted as Owner and Architect may agree, or in the absence of agreement, on an hourly basis in accordance with the hourly rates approved by Owner in advance.

### **6.3 Reimbursable Expenses.**

Reimbursable Expenses are in addition to Architect's Fee and shall include only the following expenditures incurred by Architect in the interest of the Project:

6.3.1 Expenses of reproductions, postage and handling of drawings, specifications and other documents, excluding reproductions for the office use of Architect and Architect's consultants;

6.3.2 Expenses of photographic reproduction techniques used in connection with providing Architect's services hereunder;

6.3.3 Other similar direct Project related expenditures approved by Owner in advance.

### **6.4 Payments.**

6.4.1 As a condition precedent for any payment due under this Article 6, Architect shall submit to Owner a monthly application for payment no later than the tenth day of the calendar month for services properly rendered and expenses properly incurred during the preceding month. The services rendered during the previous month shall be



calculated as a percentage of each phase completed, with any services performed on an hourly basis separately itemized. Hourly services shall be described with reasonable particularity each service rendered, the date thereof, the time expended, and the persons rendering such service. The invoices shall be itemized and supported by data substantiating Architect's right to payment as Owner may require. Each invoice shall be signed by Architect, which signature shall constitute Architect's representation to Owner that (i) the services indicated in the invoice have reached the level stated and have been properly and timely performed, (ii) the expenses included in the invoice have been reasonably incurred in accordance with this Agreement or otherwise approved by Owner in writing, (iii) all obligations of Architect covered by prior invoices have been paid in full, and (iv) the amount requested is currently due and owing, there being no reason known to Architect that payment or any portion thereof should be withheld. Submission of Architect's invoice for final payment shall further constitute Architect's representation to Owner that, upon receipt by Owner of the amount invoiced, all obligations of Architect to others, including its consultants, incurred in connection with the Project, will be paid in full. During the construction phase, Architect shall present its statement of services to Owner concurrently with the approved Certificates for Payment, when possible.

6.4.2 Owner shall pay Architect sums properly invoiced within 30 days of Owner's receipt of such invoice. If payment is not made within thirty (30) days, the outstanding balance shall bear interest at the rate of .75% per month until paid.

## 7. CHANGES

Changes in Architect's services (not involving a cardinal change to the scope of the services) may be accomplished after the execution of this Agreement upon Owner's request or if Architect's services are affected by any of the following:

- (a) A change in the instructions or approvals given by Owner that necessitate revisions to previous approvals;
- (b) Significant change to the Project, including, but not limited to size, quality, complexity, Owner's schedule, budget or procurement method;
- (c) Architect performs additional services because of active Owner interference pursuant to Section 5.2 above, or
- (d) Preparation for and attendance at a dispute resolution proceeding or a legal proceeding except where Architect is a party thereto.

If any of the circumstances affect Architect's services, Architect shall be entitled to an equitable adjustment in the Schedule of Performance and/or Architect's Fee, as mutually agreed by Owner and Architect. Prior to providing any additional services, Architect shall notify Owner of the proposed change in services and receive Owner's approval for the change. Except for a change due to the fault of Architect, a change shall entitle Architect to an equitable adjustment in the Schedule of Performance and Architect's Fee as mutually agreed by Owner and Architect. In the event Owner and Architect are unable to agree upon the equitable adjustment to Architect's Fee, the services shall be performed on a "time and materials" basis in accordance with Architect's standard hourly rate schedule and standard reimbursable expenses, approved by Owner.

## **8. CLAIMS.**

### **8.1 Claims.**

In the event that any claim, dispute or other matter in question between Owner and Architect arising out of or related to this Agreement or the breach hereof (a "Claim"), Owner and Architect shall first endeavor to resolve the Claim through direct discussions. Claims must be initiated by written notice. The responsibility to substantiate Claims rests with the party making the Claim. Except as otherwise agreed in writing, Architect shall continue to diligently perform its obligations under this Agreement and Owner shall continue to make payments in accordance with this Agreement pending the final resolution of any Claim. Architect acknowledges that Owner's ability to evaluate a Claim depends in large part on Owner being able to timely review the circumstances of the Claim. Therefore, Architect agrees that it shall submit a Claim to Owner by written notice no later than twenty-one (21) calendar days after the event or the first appearance of the circumstances giving rise to the Claim, and that such written notice shall set forth in detail all facts and circumstances supporting the Claim.

### **8.2 Mediation.**

All Claims shall be subject to mediation as a condition precedent to the institution of legal or equitable proceedings by either party. Request for mediation shall be filed in writing with the other party to this Agreement. The request may be made concurrently with the filing of a legal or equitable proceeding but, in such event, mediation shall proceed in advance of legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. The parties shall endeavor to mutually agree on an independent, professional mediator within 15 days of the request for mediation. The parties shall endeavor to have the mediation completed within 60 days of the request for mediation. The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof. Owner and Architect agree that all parties with an interest in a Claim being mediated may be included in the mediation, including, but not limited to, Construction Manager and Contractors.

## **9. SUSPENSION AND TERMINATION**

### **9.1 Suspension by Owner For Convenience.**

Owner may order Architect in writing to suspend, delay, or interrupt the performance of this Agreement, or any part thereof, for such period of time as Owner may determine to be appropriate for its convenience and not due to any act or omission of Architect. In that event, Architect shall immediately suspend, delay or interrupt the performance of this Agreement, or that portion of this Agreement, as ordered by Owner. On the resumption of Architect's services, Architect's Fee and Project Schedule shall be equitably adjusted for reasonable costs and delay resulting from any such suspension.

## **9.2 Termination by Owner for Convenience.**

Upon written notice to Architect, Owner may, without cause, terminate this Agreement. Architect shall follow Owner's instructions regarding shutdown and termination procedures, strive to mitigate all costs and stop the performance of its services. Upon such termination, Architect shall invoice Owner for all services actually performed and any reasonable costs or expenses incurred by Architect in connection with the termination (such as services necessary to shutdown performance), but not lost profits, unabsorbed overhead or lost opportunity).

## **9.3 Termination by Owner for Cause.**

If Architect fails to fully and faithfully perform its duties and responsibilities under this Agreement, Owner may give Architect written notice of such failure and Owner's intent to terminate Architect's services if Architect fails to commence and diligently continue satisfactory correction of such failure within ten (10) days. If Architect fails to commence and diligently continue satisfactory correction of the failure within such 10-day period, Owner may terminate Architect's services by written notice. Upon such termination, Architect shall not be entitled to receive further payment until the Project is finished. If the unpaid balance of Architect's Fee exceeds costs of finishing Architect's services and other damages incurred by Owner, such excess shall be paid to Architect. If such costs and damages exceed the unpaid balance, Architect shall pay the difference to Owner.

## **9.4 Termination by Architect.**

Upon fourteen (14) days' prior written notice to Owner, Architect may terminate this Agreement if (i) the progress of the Project has been suspended by Owner for convenience for a period of ninety (90) days through no fault of Architect; (ii) Owner fails to pay Architect in accordance with this Agreement and Architect has not defaulted; or (iii) Owner otherwise breaches this Agreement or fails to perform its duties and responsibilities under this Agreement and Owner has failed to cure the breach or failure to perform within thirty (30) days after Architect provides written of the breach or failure to perform to Owner. Upon such termination, Architect shall invoice Owner for all services actually performed and any reasonable costs or expenses incurred by Architect in connection with the termination (such as services necessary to shutdown performance), but not lost profits, unabsorbed overhead or lost opportunity).

# **10. GENERAL PROVISIONS**

## **10.1 Ownership of Design and Work Product.**

**10.1.1 Architectural Design.** Owner and Architect agree that Owner is developing, with the assistance of Architect, an architectural design theme for the Project (the "Architectural Design"). Architect acknowledges and agrees that Architectural Design is being developed for Owner and Owner shall be deemed to be Owner of all common law, statutory and other reserved rights thereto, subject to the provisions of Sections 10.1.3 and 10.1.4 below.

**10.1.2 Work Product.** Architect will document and implement Architectural Design into drawings, sketches, renderings, calculations, specifications and other

documents, including those in electronic form, prepared by Architect and Architect's consultants (the "Work Product"). Architect acknowledges and agrees that the Work Product is being developed for Owner and Owner shall be deemed Owner of all common law, statutory and other reserved rights thereto, subject to the provisions of Sections 10.1.3 and 10.1.4 below. Architect may reproduce and distribute the Work Product as necessary to perform its services on the Project.

10.1.3 Modification and Reuse by Owner. Owner understands that the Work Product is an expression of Architectural Design and instruments of Architect's services for the Project, not products. Owner understands and agrees that the Work Product has been prepared for this Project only and are not suitable for reuse on other projects without first being reviewed and/or modified by an appropriately credentialed design professional, who shall then take responsibility for the accuracy and completeness thereof. Owner shall have the right to transfer and reuse the Work Product; provided, however, in such event Owner agrees to indemnify Architect against claims arising from any reuse of, or alterations made to, the Work Product not authorized by Architect.

10.1.4 Modification and Reuse by Architect. Architect shall have the right to retain and make copies of the Work Product and to reuse any of the constituent parts of Architectural Design or Work Product on any other project, except for any unique or distinctive architectural components or effects, which taken independently or in combination, would produce a project with substantially similar or distinct features.

10.1.5 Architect's Consultants. Architect agrees that all consultants retained by Architect to provide any services on the Project shall expressly agree in writing to be bound by the terms of this Section 10.1 to the same extent as Architect.

## 10.2 Insurance.

10.2.1 Errors and Omissions Liability. Architect shall provide errors and omissions liability insurance on an aggregate limits "claims made" basis in an amount not less than Two Million Dollars (\$2,000,000). Architect shall either (i) maintain the specified levels of aggregate limits "claims made" insurance for no less than three years after completion or termination of Architect's services under this Agreement, or (ii) provide tail coverage for claims, demands or actions reported within six (6) years after completion or termination of Architect's services under this Agreement for acts or omissions during the term of this Agreement.

10.2.2 General Commercial Liability. Architect shall maintain at all times commercial general liability insurance and excess liability coverage on occurrence form basis (standard, unmodified) with products and completed operations coverage in an amount not less than One Million Dollars (\$1,000,000) per occurrence and Two Million Dollars (\$2,000,000) annual aggregate.

10.2.3 Worker's Compensation. Architect will maintain at all times such worker's compensation and employer's liability coverage insurance as required by the laws of the State in which the Project is located and any other state in which Architect or its

employees perform services for Owner. The policy must be endorsed to include a waiver of subrogation.

10.2.4 Additional Insureds. Upon Owner's request, Architect shall have Owner and Owner's lender, if any, named as additional insureds under all of Architect's liability insurance policies (not including errors and omissions and workers' compensation insurance).

10.2.5 Certificates of Insurance. Architect shall provide certificates of insurance issued by the insurer to Owner for each policy required under this Section 10.1 and, if requested by Owner, copies of each insurance policy. Each certificate issued to Owner shall contain the following covenant of the issuer: "Should any of the above described policies be cancelled before the expiration date thereof, the issuing company will mail 30 days written notice to the certificate holder."

10.2.6 Architect's Consultants. Architect shall require its consultants to maintain at all times insurance coverages consistent with the consultant's role on the Project and reasonably acceptable to Owner.

### 10.3 Recitals and Exhibits.

The recitals above and the exhibits referred to in this Agreement and attached hereto are incorporated into the agreement as if set out in full in the body of the Agreement. In the event of a conflict between any exhibit and the body of this Agreement, the Agreement shall control.

### 10.4 Counterparts; Facsimile Transmission.

This agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute but one and the same agreement. Delivery of an executed counterpart of a signature page to this agreement via facsimile transmission shall be as effective as delivery of an original signed copy, provided that an original signed copy shall be delivered to the party entitled thereto within five (5) business days after such facsimile transmission.

### 10.5 Attorneys' Fees.

In the event of any controversy, claim or action being filed or instituted between the parties to this agreement to enforce the terms and conditions of this agreement or arising from the breach of any provision hereof, the prevailing party will be entitled to receive from the other party all costs, damages, and expenses, including reasonable attorneys' fees, incurred by the prevailing party, whether or not such controversy or claim is litigated or prosecuted to judgment. The prevailing party will be that party who was awarded judgment as a result of trial and determined by a judge as the prevailing party.

#### **10.6 Governing Law.**

This agreement shall be governed by the laws, including conflicts of laws, in the State of Idaho as an agreement between residents of the State of Idaho and to be performed within the State of Idaho.

#### **10.7 Venue.**

As a material part of the consideration for this agreement, each of the parties hereto agrees that in the event any legal proceeding shall be instituted between them, such legal proceeding shall be instituted in the courts of Ada County, State of Idaho, and each of the parties hereto agrees to submit to the jurisdiction of such courts.

#### **10.8 Grammatical Usage.**

In construing this agreement, feminine or neuter pronouns shall be substituted for those masculine in form and vice versa, plural terms shall be substituted for singular and singular for plural in any place in which the context so requires, and the word "including" shall be construed as if the words "but not limited to" appear immediately thereafter.

#### **10.9 Binding Effect.**

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and assigns. Architect shall not assign its rights hereunder, nor shall it delegate any of its duties hereunder, without the written consent of Owner. Owner may assign this Agreement to any affiliated entity or to any lender providing construction financing without Architect's prior written consent. Architect agrees to execute all consents reasonably required to facilitate such an assignment. If either party makes such an assignment, that party shall nevertheless remain legally responsible for all obligations under this Agreement, unless otherwise agreed by the other party.

#### **10.10 Headings.**

The headings contained in this agreement are for reference purposes only and shall not in any way affect the meaning or interpretation hereof.

#### **10.11 Additional Acts.**

Except as otherwise provided herein, in addition to the acts and deeds recited herein and contemplated to be performed, executed and/or delivered by the parties, the parties hereby agree to perform, execute and/or deliver or cause to be performed, executed and/or delivered any and all such further acts, deeds and assurances as any party hereto may reasonably require to consummate the transaction contemplated hereunder.

#### **10.12 Time of Essence.**

All times provided for in this agreement, or in any other document executed hereunder, for the performance of any act will be strictly construed, time being of the essence.

### 10.13 Notice.

All notice between the parties shall be deemed received when personally delivered or when deposited in the United States mail postage prepaid, registered or certified, with return receipt requested, or sent by telegram or mail-o-gram or by recognized courier delivery (e.g. Federal Express, Airborne, Burlington, etc.) addressed to the parties, as the case may be, at the address set forth below or at such other addresses as the parties may subsequently designate by written notice given in the manner provided in this Section:

Owner: To be determined by Owner. Upon Owner's selection of its authorized representative, Owner will provide Architect the name and contact information for such representative.

With a copy to: Office of the City Clerk  
City of Meridian  
33 East Idaho Avenue  
Meridian, Idaho 83642-2300  
Telephone: 208-888-4433  
Facsimile: 208-884-8119  
Email: bergw@meridiancity.org

City Attorney's Office  
City of Meridian  
33 East Idaho Avenue  
Meridian, Idaho 83642-2300  
Telephone: 208-898-5506  
Facsimile: 208-884-8723  
Email: bairdt@meridiancity.org

Architect: Steve Simmons  
LCA Architects, P.A.  
1221 Shoreline Lane  
Boise, Idaho 83702  
Telephone: 208-345-6677  
Facsimile: 208-344-9002  
Mobile: 208-830-4122  
Email: ssimmons1@lcarch.com

With a copy to: Russell Moorhead  
LCA Architects, P.A.  
1221 Shoreline Lane  
Boise, Idaho 83702  
Telephone: 208-345-6677  
Facsimile: 208-344-9002  
Mobile: 208-830-4166  
Email: rmoorhead@lcarch.com

#### **10.14 Rights and Remedies Cumulative.**

Except as otherwise expressly stated in this Agreement, the rights and remedies of the parties are cumulative, and the exercise by any party of one or more of such rights or remedies shall not preclude the exercise by it, at the same time or different times, of any other rights or remedies for the same default or any other default by the other party. In the event of a default, the parties have all of the rights and remedies afforded in law or in equity, except as provided herein to the contrary.

#### **10.15 Third-Party Beneficiaries.**

Nothing contained herein shall create any relationship (contractual or otherwise) with, or any rights in favor of, any third party. Architect's duties and responsibilities shall not relieve any other party, including Construction Manager and Contractors, from their duty to fully and faithfully perform their contractual and other obligations to Owner.

#### **10.16 Integration; Waivers.**

This is the entire agreement between the parties with respect to the matters covered herein and supersedes all prior agreements between them, written or oral. This Agreement may be modified only in writing signed by both parties. Any waivers hereunder must be in writing. No waiver of any right or remedy in the event of default hereunder shall constitute a waiver of such right or remedy in the event of any subsequent default.

#### **10.17 Severability.**

If any term or provision of this agreement shall, to any extent be determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this agreement shall not be affected thereby, and each term and provision of this agreement shall be valid and be enforceable to the fullest extent permitted by law; and it is the intention of the parties hereto that if any provision of this agreement is capable of two constructions, one of which would render the provision void and the other of which would render the provision valid, the provision shall have the meaning which renders it valid.

[end of text]



The parties have executed this Agreement effective as of the date first set forth above.

"Owner"

CITY OF MERIDIAN,  
an Idaho municipal corporation

By: Tammy de Weerd  
Tammy de Weerd  
Mayor

Date: 7-11-06

ATTEST:

*Approved by City Council 7-11-06*

William G. Berg, Jr.  
William G. Berg, Jr.  
City Clerk

Date: 7-11-06

"Architect"

LCA ARCHITECTS, P.A.,  
an Idaho professional corporation

By: Steve Simmons  
Steve Simmons, President

Date: 7/11/06

STATE OF IDAHO )  
 : SS  
County of Ada )

On this 11<sup>th</sup> day of July, 2006, before me, a Notary Public, personally appeared TAMMY DE WEERD and WILLIAM G. BERG, JR., known or identified to me to be the MAYOR and CITY CLERK, respectively, of the CITY OF MERIDIAN, who executed the instrument or the person that executed the instrument of behalf of said City, and acknowledged to me that such City executed the same.

(SEAL)

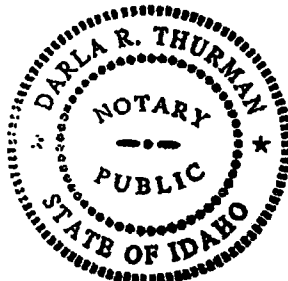


Sharon Smith  
Notary Public for Idaho  
Residing at: Melba, Id  
Commission expires: 10-15-11

STATE OF IDAHO )  
 : SS  
County of Ada )

On this 11<sup>th</sup> day of July, 2006, before me, a Notary Public, personally appeared STEVE SIMMONS, known or identified to me to be the PRESIDENT of LCA ARCHITECTS, P.A., an Idaho professional corporation, who executed the instrument or the person that executed the instrument of behalf of such corporation, and acknowledged to me that such corporation executed the same.

(SEAL)

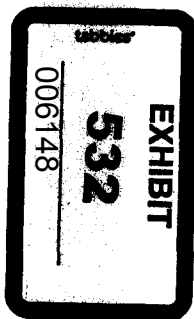


Darla R. Thurman  
Notary Public for Idaho  
Residing at: Idaho  
Commission expires: Jan 15, 2011

# DEPOSITION EXHIBIT

## NO. 229

Contract Document	Description Status	Issue Date
Phase 2 Cold Shell & Core	Drawings & Specifications	2/27/07
Phase 3 Tenant Improvements/ MEP	Drawings & Specifications	5/29/07
Phase 3 Tenant Improvements/MEP	Bid Documents	5/31/07
Phase 3 Security/Audio-Visual Revision	Drawings	9/10/07
Phase 3 Security/Audio-Visual Revision	Bid Documents	9/12/07
Phase 3 Interior Signage	Drawings & Specs	2/11/08
Phase 3 Interior Signage	Bid Documents	4/23/08
Phase 3 – Final Clean	Drawings & Specifications and Bid Documents	7/1/08
Phase 4 Plaza & Site Improvements	Drawings & Specifications	7/27/07
Phase 4 Plaza & Site Improvements	Bid Documents	10/22/07
Phase 4 Plaza Redesign	Drawings & Specifications	2/22/08
Phase 4 Plaza Redesign	Bid Documents	3/5/08
Phase 5 East Parking Lot	Drawings & Specifications and Bid Documents	8/01/08



**MATERIALS  
TESTING &  
INSPECTION****EXHIBIT "A"**  
**PAGE 1 OF 4**

Rev. 02/16/07

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Creamery P2ESA.doc☐ Environmental Services ☐ Geotechnical Engineering ☐ Construction Materials Testing ☐ Special Inspections

MR. WESLEY BETTIS  
PETRA, INC.  
9056 W. Black Eagle Drive  
Boise, Idaho 83709

Phone: 323-4500

Fax: 323-4507

**Re: Proposal for Phase II Subsurface Investigation  
At the former Meridian Creamery  
Meridian, Idaho**

Dear Mr. Bettis:

In response to your request, Materials Testing and Inspection, Inc. (MTI) is pleased to submit the following proposal for the performance of a Phase II Subsurface Investigation at the above referenced site. It is understood that a suspected petroleum release was discovered on a portion of the former Meridian Creamery, Meridian, Idaho. This investigation is to identify the contaminants of concern, determine the full lateral and vertical extent of the contamination and to determine the most appropriate approach for the project, such as performing a risk based analysis or through remediation by removal of the source area.

MTI proposes to investigate the presence and extent of soil and groundwater contamination associated with the above-defined areas in the following manner:

1. Install at least eight excavated test pits using a steel tracked hoe at separate locations on the site;
2. Perform on-site screening of test pit locations using field techniques and equipment;
3. Collect subsurface soil and ground water grab samples in at least eight locations on the site;
4. Submit the samples for confirmation analysis for site specific contaminants of potential concern;
5. Prepare a summary of our findings in a written report.

It is proposed that the fees for the performance of the outlined services be determined on a unit fee basis, and that services be provided in accordance with the attached MTI General Conditions for Environmental Site Assessment Services, which are incorporated into and made part of this proposal. Additional work required beyond the scope of services included in this proposal is not anticipated but if needed will be invoiced on a unit fee basis, in accordance with the unit rates listed below. The following estimated fees for your project are based upon the items and quantities quoted (this is not a "Not to Exceed" quote). All services and fees which are beyond the scope of this estimate will be charged at our standard rates.

**EXHIBIT****533**



# **MATERIALS TESTING & INSPECTION**

**EXHIBIT "A"**  
**PAGE # 2 OF 4**

Rev. 02/15/07

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Creamery P2ESA.doc

☐ Environmental Services    ☐ Geotechnical Engineering    ☐ Construction Materials Testing    ☐ Special Inspections

## **SCHEDULE OF FEES AND SERVICES**

Environmental Site Assessment Services	Rate	Unit	Subtotal
<b>ENVIRONMENTAL SERVICES</b>			
Site Inspection	\$65.00	40	\$2,600.00
Project Management	\$75.00	6	\$450.00
Soil/Water Sample Analysis via TPH (Method 8015)	\$125.00	8	\$1,000.00
Soil/Water Sample Analysis via PAHs (Method 8270C)	\$208.00	16	\$3,328.00
Soil/Water Sample Analysis via BTEX+N+M (Method 8260B)	\$125.00	16	\$2,000.00
Analysis for RCRA 8 Metals	\$150.00	4	\$600.00
Report Preparation, per hour	\$75.00	16	\$1,200.00
<b>MISCELLANEOUS SERVICES</b>			
Excavation of Test PKs (includes mobilization & de-mob)	\$1,725.00	2	\$3,450.00
Expendables (supplies, containers, tubing, etc.)	\$50.00	1	\$50.00
Field Equipment Usage (PID, pumps, magnetic locator, etc.)	\$85.00	1	\$85.00
CADD Operator	\$30.00	2	\$60.00
Registered Professional Geologist Review	\$75.00	2	\$150.00
<b>ESTIMATED PROJECT TOTALS:</b>			<b>\$14,973.00</b>

This amount will not be exceeded without advanced justification to and authorization by our client. Please note if ground water contamination is disclosed, further investigation and notification to the Idaho DEQ may be required. MTI will proceed with the work upon receipt of a signed copy of this proposal, intact. MTI appreciates this opportunity to be of service to you. Please feel free to contact us to answer any questions you may have concerning this proposal.

Respectfully submitted,  
MATERIALS TESTING AND INSPECTION, INC.

Rusty Boicourt, P.G.  
Environmental Services Manager

Attached: Professional Services Contract



# MATERIALS TESTING & INSPECTION

PAGE # 3 OF 4  
FEBRUARY 15, 2007

DOCUMENT2

☐ Environmental Services    ☐ Geotechnical Engineering    ☐ Construction Materials Testing    ☐ Special Inspections

## PROFESSIONAL SERVICES CONTRACT

THIS AGREEMENT is made and entered into effective this Thursday, February 15, 2007 by and between PETRA, INC. ("CLIENT") and MATERIALS TESTING & INSPECTION, INC. ("CONSULTANT") and is made with reference to the following facts and objectives:

### RECITALS:

WHEREAS, CLIENT intends to have MTI Perform a Phase II Subsurface Investigation in accordance with the Proposal (Exhibit "A") on the above referenced site (hereinafter referred to as the "Project").

NOW, THEREFORE, in consideration of their mutual covenants, CLIENT and CONSULTANT herein agree, in respect of the performance of professional materials testing and construction inspection services by CONSULTANT and the payment for those services by CLIENT, as set forth below.

- I. **SCOPE OF SERVICE.** The services to be performed by CONSULTANT under this Agreement are described in Exhibit "A" attached hereto, and incorporated herein by this reference as though fully set forth. Any estimated quantities contained in Exhibit "A" are estimates only and CLIENT agrees that CONSULTANT is entitled to payment for reasonable services rendered in excess of the estimated quantities and/or cost figures as described in Exhibit "A".
- II. **PAYMENTS TO CONSULTANT.** CLIENT shall pay CONSULTANT for the services rendered hereunder in accordance with the fee and payment schedule attached hereto as Exhibit "A". CONSULTANT shall submit monthly statements for services rendered and for reimbursable expenses incurred. Administrative and/or management time for report review and preparation, schedule changes, and other project related activities will be added to the Inspector's/technician's time. All monthly statements submitted to CLIENT shall be due and payable at the time of the billing unless otherwise specified in this Agreement. If CLIENT fails to pay CONSULTANT within thirty (30) days after receipt of monthly statements for services rendered and for reimbursable expenses incurred, CLIENT agrees to pay one percent (1%) interest per month until the monthly statements are paid in full. CLIENT further agrees that nonpayment of monthly statements beyond a seventy-five (75) day period constitutes a material breach of this Agreement with the exception of reasonably disputed amounts that upon written notice from CONSULTANT, the duty, obligations and responsibilities of CONSULTANT under this Agreement are terminated. In such event CLIENT shall promptly pay CONSULTANT for all fees, charges and services as outlined in Exhibit "A" provided by CONSULTANT up to the date of termination.
- III. **SERVICES.** CONSULTANT will act for CLIENT in a professional manner, using that degree of care and skill ordinarily exercised by and consistent with the standards of the professional practicing in the same or similar locality of the Project site. CONSULTANT makes no warranty, either expressed or implied, as to its findings, recommendations, specifications or professional advice. CONSULTANT will provide only those services that, in the option of CONSULTANT, lie within the technical and professional areas of expertise of CONSULTANT as set forth in Exhibit "A" and which CONSULTANT is adequately staffed and equipped to perform. CLIENT shall request in writing if CLIENT desires CONSULTANT to provide services outside of the scope of services described in Exhibit "A", attached hereto. CONSULTANT shall advise CLIENT in writing of any services that lie outside the technical and professional expertise of CONSULTANT.
- IV. **SAMPLE DISPOSAL.** Unless otherwise agreed to in writing, samples removed from Project site by CONSULTANT to a laboratory will, upon completion of testing, be disposed by CONSULTANT or the laboratory. CLIENT further agrees the cost for disposal of Hazardous Materials to include the characterization costs shall be borne by CLIENT.
- V. **CLIENT'S RESPONSIBILITIES.** CLIENT or CLIENT'S authorized representatives will provide CONSULTANT with all revised and updated plans, specifications, addenda, change orders, approved shop drawings and any other information for the proper performance of CONSULTANT pursuant to this Agreement. CONSULTANT shall not be responsible for any errors and/or omissions in the performance of CONSULTANT'S work or services rendered resulting from CLIENT'S failure to provide CONSULTANT with revised and updated plans, specifications, addenda, change orders, approved shop drawings and other information for the proper performance of CONSULTANT. (CLIENT will arrange and provide access to each area in which it will be necessary for CONSULTANT to perform its work).
- VI. **INSURANCE.** CONSULTANT shall secure and maintain throughout the full period of this Agreement sufficient insurance to protect it adequately from claims under applicable Workmen's Compensation Acts and from claims for bodily injury, death or property damage as may arise from the performance of services under this Agreement. In addition, CONSULTANT shall secure and maintain throughout the full period of Agreement sufficient Professional Liability Insurance to protect it adequately from claims arising from errors or omissions resulting from Professional Services.
- VII. **EXEMPTIONS OF CONSULTANT'S RESPONSIBILITIES.** CONSULTANT shall not be responsible for acts and/or omissions of any party or parties involved in the design of the Project or the failure of any Contractor or Subcontractor to construct any aspect of the Project in accordance with the contract documents, or in accordance with recommendations contained in any correspondence or written recommendations issued by CONSULTANT. CONSULTANT is not authorized to revoke, alter, relax, enlarge or release any requirement of the Project's specifications or other contract documents, nor to approve or accept any portion of the work, unless specifically authorized in writing by CLIENT or his authorized representative. CONSULTANT shall not have the right of rejection or the right to stop work, except for such periods as may be required to conduct sampling, testing, or inspection of operations covered by this Agreement. CONSULTANT shall not be liable for damages resulting from the actions or inactions of any governmental agencies, including but not limited to, permit



# **MATERIALS TESTING & INSPECTION**

PAGE # 4 OF 4  
FEBRUARY 16, 2007

DOCUMENT2

☐ Environmental Services ☐ Geotechnical Engineering ☐ Construction Materials Testing ☐ Special Inspections

processing, environmental impact reports, governmental building inspections, dedications, general plans and amendments thereto, zoning matters, annexations or consolidations, use or conditional use permits and/or building permits.

- VIII. **CHANGES IN SCOPE OF WORK.** CLIENT, without invalidating this Agreement may order changes in the scope or character of services and/or work performed by CONSULTANT, either decreasing or increasing the amount of CONSULTANT'S work or services. All such changes in the work and/or services performed by CONSULTANT shall be authorized by a written change order signed by CLIENT and shall be performed under the applicable terms and conditions of this Agreement. CONSULTANT shall not be obligated to perform any changes in the scope or character of the work and/or services until CONSULTANT is in receipt of a written change order signed by CLIENT and signed by CONSULTANT indicating its agreement therewith.
- IX. **LIMITATION OF LIABILITY.** Should MTI or any of its professional employees be found to have been negligent in the performance of its work, or to have made and breached any express or implied warranty, representation or contract, Client, all parties claiming through Client and all parties claiming to have in any way relied upon MTI's work, agree that the maximum aggregate amount of the liability of MTI, its officers, employees and agents shall be limited to \$5,000.00 or the total amount of the fee paid to MTI under this Agreement or the limit of any optional, Client-purchased insurance, whichever amount is lesser.
- X. **COMPENSATION FOR SERVICES RENDERED.** CLIENT recognizes that the estimate noted in Exhibit "A" (if provided) was obtained through a diligent evaluation of the contract documents and scheduled discussions with the Owner, relevant subcontractors and the general contractor. CLIENT recognizes that the testing and inspection industry, and the services rendered herein under this contract, are schedule driven and are as mandated by the scheduling and manning of the contractor(s). Should such items, for example, as the quantity of concrete placement, field or shop steel welding schedules or masonry placement days after from that quoted within our proposal, CONSULTANT shall be entitled to compensation for services rendered.
- XI. **OVERTIME AND BILLING MINIMUM.** CLIENT recognizes the attached Exhibit "A" which outlines billing minimums of two (2) hours for any services rendered on site. In addition, CLIENT recognizes that, on occasion, due to the schedule of the contractor or relevant subcontractors, occasional overtime will be encountered. Due to the nature of the construction business, CONSULTANT will have no notice of this until the day the said overtime occurs. CLIENT agrees to compensate CONSULTANT for such overtime.
- XII. **LIMITATION OF SERVICES PROVIDED.** The services provided pursuant to this agreement are intended solely for the use and benefit of the CLIENT as noted above. No other person or entity shall be entitled to rely on the services, opinions, recommendations, plans, or specifications provided pursuant to this agreement without the expressed written consent of CONSULTANT.
- XIII. **INDEMNITY.** CLIENT agrees to defend, indemnify, and hold CONSULTANT, its officers, directors, employees, agents and independent contractors harmless from any and all claims, suits or liability for personal injury, death, illness, property damage, damage to natural resources, fine or penalty arising or alleged to have arisen out of performance of CONSULTANT'S work to the extent that such claims or damages were due to the negligence of the CLIENT, except to the extent due to gross negligence or intentionally wrongful conduct of CONSULTANT. CLIENT further agrees to compensate CONSULTANT for all costs, expenses and fees reasonably incurred in defending any such claim, including court costs and attorney's fees. In the event CLIENT shall bring any action against CONSULTANT, to the extent CONSULTANT prevails in such action, CLIENT shall provide the same compensation.
- XIV. **PROVISIONS SEVERABLE.** The unenforceability or invalidity of any provision or provisions hereof shall not render any other provision or provisions unenforceable or invalid. Nothing in the Agreement shall relieve any party from its responsibilities under law or contract.
- XV. **LOCATION OF AGREEMENT AND DURATION OF PROPOSAL.** This agreement is governed by the laws of the State of Idaho, and is entered into the County of Ada, City of Boise. The attached Proposal shall remain valid and in effect for 180 days from the date written in below.
- This agreement contains the entire and integrated Agreement between CLIENT and CONSULTANT and supersedes all prior negotiations, representations or agreements, either written or oral. This agreement cannot be amended or modified except by a written Agreement, executed by each of the parties hereto. This Agreement is covered by the laws of the state of Idaho.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date and year first above written, at Boise, Idaho.

Consultant:

Client:

Materials Testing &amp; Inspection, Inc.

Company Name

Name &amp; Title:

Name &amp; Title:

Date:

Date:

# Analytical Laboratories, Inc.

1804 N. 33rd Street  
Boise, Idaho 83703  
Phone (208) 342-5515

Date Report Printed: 3/7/2007 11:53:47 AM

Attn: JON KRUCK  
MATERIALS TESTING & INSPECTION  
2791 S VICTORY VIEW WAY  
BOISE, ID 83709

Collected By:  
Submitted By: J BABIONE

Source of Sample:

PROJECT: CREAMERY BORE HOLE PILE

Time of Collection: 16:55  
Date of Collection: 2/14/2007  
Date Received: 3/5/2007  
Report Date: 3/7/2007

PWS: PWS

## Laboratory Analysis Report

Sample Number: 0707409

EPA 8270C testing by Anatek Labs.(ATL)

Test Requested	MCL	Analysis Result	Units	MDL	Method	Date Completed	Analyst
Acenaphthene		5.31	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Acenaphthylene		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Anthracene		3.24	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Benzidine		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Benzo(a)anthracene		5.55	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Benzo(a)pyrene		3.05	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Benzo(b)fluoranthene		3.03	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Benzo(ghi)Perylene		6.76	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Benzo(k)fluoranthene		1.83	mg/kg	1.25	EPA 8270	3/6/2007	ATL
4-Bromophenyl phenyl ether		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Butyl benzyl phthalate		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATI.
4-Chloro-3-methylphenol		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
4-Chloroaniline		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Bis(2-chloroethoxy)methane		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Bis(2-chloroethyl)ether		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Bis(2-chloroisopropyl)ether		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
2-Chloronaphthalene		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
2-Chlorophenol		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL

MCL = Maximum Contamination Level  
MDL = Method/Minimum Detection Limit  
UR = Unregulated



# Laboratory Analysis Report

Sample Number: 0707409

EPA 8270C testing by Anatek Labs.(ATL)

Test Requested	MCL	Analysis Result	Units	MDL	Method	Date Completed	Analyst
4-Chlorophenyl phenyl ether		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Chrysene		6.59	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Di-n-butyl phthalate		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Di-n-octylphthalate		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Dibenzo(a,h)anthracene		5.90	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Dibenzofuran		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
1,2-Dichlorobenzene		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
1,3-Dichlorobenzene		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
1,4-Dichlorobenzene		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
3,3'-Dichlorobenzidine		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
2,4-Dichlorophenol		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Diethyl phthalate		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Dimethyl phthalate		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
2,4,-Dimethylphenol		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
2,4,-Dinitrophenol		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
2,4-Dinitrotoluene		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
2,6-Dinitrotoluene		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
1,2-Diphenylhydrazine		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Bis(2-ethylhexyl)phthalate		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Fluoranthene		1.69	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Fluorene		7.22	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Hexachlorobenzene		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Hexachlorobutadiene		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Hexachlorocyclopentadiene		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Hexachloroethane		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Indeno(1,2,3-cd)pyrene		5.38	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Isophorone		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
2-Methylnaphthalene		3.48	mg/kg	1.25	EPA 8270	3/6/2007	ATL
2-Methylphenol		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
4-Methylphenol		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Naphthalene		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
2-Nitroaniline		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL

MCL = Maximum Contamination Level  
 MDL = Method/Minimum Detection Limit  
 UR = Unregulated

# Laboratory Analysis Report

Sample Number: 0707409

EPA 8270C testing by Anatek Labs.(ATL)

Test Requested	MCL	Analysis Result	Units	MDL	Method	Date Completed	Analyst
3-Nitroaniline		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
4-Nitroaniline		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Nitrobenzene		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
2-Nitrophenol		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
4-Nitrophenol		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
N-Nitrosodi-n-propylamine		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
N-Nitrosodimethylamine		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATI.
N-Nitrosodiphenylamine		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Pentachlorophenol		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Phenanthrene		14.1	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Phenol		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Pyrene		9.87	mg/kg	1.25	EPA 8270	3/6/2007	ATL
1,2,4-Trichlorobenzene		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
2,4,5-Trichlorophenol		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
2,4,6-Trichlorophenol		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Phenols		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Carbazole		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Azobenzene		<1.25	mg/kg	1.25	EPA 8270	3/6/2007	ATL
Acetone		<0.125	mg/kg	0.125	EPA 8260	3/6/2007	DMB
Benzene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Bromochloromethane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Bromodichloromethane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Bromoform		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Bromomethane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
n-Butylbenzene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
sec-Butylbenzene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
tert-Butylbenzene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Carbon tetrachloride		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Chlorobenzene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Chloroethane		<0.050	mg/kg	0.05	EPA 8260	3/6/2007	DMB
2-Chloroethyl vinyl ether		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Chloroform		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB

MCL = Maximum Contamination Level  
MDL = Method/Minimum Detection Limit  
UR = Unregulated

# Laboratory Analysis Report

Sample Number: 0707409

EPA 8270C testing by Arotek Labs.(ATL)

Test Requested	MCL	Analysis Result	Units	MDL	Method	Date Completed	Analyst
Chloromethane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
2-Chlorotoluene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
4-Chlorotoluene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Dibromochloromethane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Dibromomethane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Dichlorodifluoromethane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
1,2-Dibromo-3-chloropropane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Ethylene Dibromide		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
1,2-Dichlorobenzene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
1,3-Dichlorobenzene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
1,4-Dichlorobenzene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Trans-1,4-Dichloro-2-Butene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
1,1-Dichloroethane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
1,2-Dichloroethane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
1,1-Dichloroethene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
cis-1,2-Dichloroethene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
trans-1,2-Dichloroethene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Methylene chloride		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
1,2-Dichloropropane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
2,2-Dichloropropane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
cis-1,3-Dichloropropene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
trans-1,3-Dichloropropene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Ethylbenzene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Hexachlorobutadiene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
2-Hexanone		<0.125	mg/kg	0.125	EPA 8260	3/6/2007	DMB
Isopropylbenzene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
p-Isopropyltoluene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Methyl ethyl ketone		<0.125	mg/kg	0.125	EPA 8260	3/6/2007	DMB
4-Methyl-2-pentanone (MIBK)		<0.125	mg/kg	0.125	EPA 8260	3/6/2007	DMB
Naphthalene		<0.125	mg/kg	0.125	EPA 8260	3/6/2007	DMB
n-Propylbenzene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Styrene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB

MCL = Maximum Contamination Level  
MDL = Method/Minimum Detection Limit  
UR = Unregulated

# Laboratory Analysis Report

Sample Number: 0707409

EPA 8270C testing by Anatek Labs.(ATL)

Test Requested	MCL	Analysis Result	Units	MDL	Method	Date Completed	Analyst
1,1,1,2-Tetrachloroethane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
1,1,2,2-Tetrachloroethane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Tetrachloroethene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Toluene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
1,2,3-Trichlorobenzene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
1,2,4-Trichlorobenzene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
1,1,1-Trichloroethane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
1,1,2-Trichloroethane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Trichloroethene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Trichlorofluoromethane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
1,2,3-Trichloropropane		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Vinyl chloride		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Xylene, Total		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
1,3,5-Trimethylbenzene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
1,2,4-Trimethylbenzene		<0.025	mg/kg	0.025	EPA 8260	3/6/2007	DMB
Diesel Range Organics		11,500	mg/kg	50	EPA 8015	3/6/2007	CY
Gasoline Range Organics		<40.0	mg/kg	40	EPA 8015	3/6/2007	CY
Oil Range Organics		12,400	mg/kg	50	EPA 8015	3/6/2007	CY

MCL = Maximum Contamination Level MDL = Method/Minimum Detection Limit UR = Unregulated

Thank you for choosing Analytical Laboratories for your testing needs.

If you have any questions concerning this report.

please contact: David Bennett

Page 5 of 5

006157  
PETRA85751



# MATERIALS TESTING & INSPECTION

## ASTM C-1314 Compressive Strength of Masonry Prisms

PAGE #1 OF 1  
REVISION DATE 8/17/2007  
P:\BOISE\2007 REPORTS\400-  
590AB70581C\CAJ5758.DOC

• Environmental Services • Geotechnical Engineering • Construction Materials Testing • Special Inspections

Keith Watts  
City of Meridian  
33 East Idaho Avenue  
Meridian, ID 83642

Phone: (208) 898-5500  
Fax: (208) 888-4218  
Other:

### Project: Meridian City Hall

Contractor: Petra  
Supplier: ICCO  
Mix ID: 3136522  
Location: North stair tower, elevation 4' to 8'

Inspector: Clark  
Truck #: 3102  
# Of Yards: 6.5

Ticket #: 76809724  
Report #: 071sm

Date Made: 7/16/07	Specified CMU f'm (psi): 1500
Type of CMU: Normal wt. smooth face	Grout f'c (psi): 2000
Nominal Size (in.): 8x8x16	Mortar f'c (psi): 1800
Ambient Temperature (°F): 93°	Time Grout Batched: 10:30am
Temperature of Grout (°F): 86°	Time Grout Placed: 11:10am
Mortar Type:	Temperature of Mortar (°F):
Min / Max Temp. F first 48 hours:	Diameter of Spherical Seat: 6.5 in.
Upper/Lower Platen Diameter: 11.5 in.	Required Upper/Lower Bearing Plate Thickness: 2.85 in.
Provided Upper/Lower Bearing Plate Thickness: 2.85 in.	

Cast Date: Jul 17, 07															
# of Prisms: 4															
CMU Prism ID	Date Received	Test Age in Days	Date Tested	Prism Grouted ?	Prism Width (inches)	Prism Length (inches)	Prism Height (inches)	Height : least lateral prism dimension	Correct on Factor	Percent Net Area ASTM C140	Net Area (sq. in.)	Failure Load (lbs)	Corrected Compressive Strength (psi)	Failure Mode 1-7 below	
5758	Jul 19, 07	7	Jul 24, 07	yes	7.60	7.60	15.90				57.76	131,400	2,280		
5759	Jul 19, 07	28	Aug 14, 07	yes	7.60	7.60	15.85				57.76	107,280	1,860		
5760	Jul 19, 07	28	Aug 14, 07	yes	7.60	7.60	15.50				57.76	109,480	1,900		
Compressive Strength of Masonry (average for the set of 28 day prisms (psi)):													1,880		

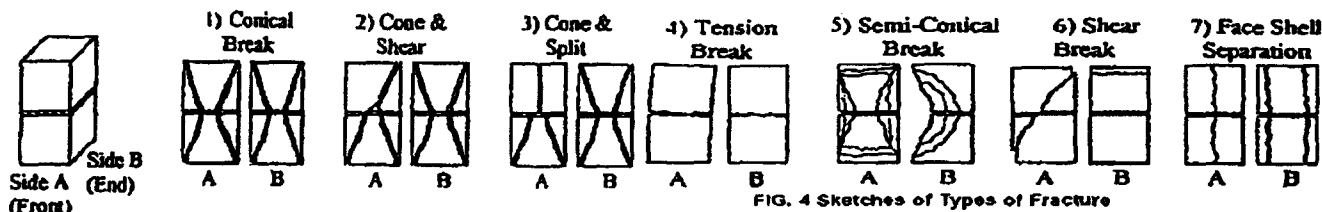
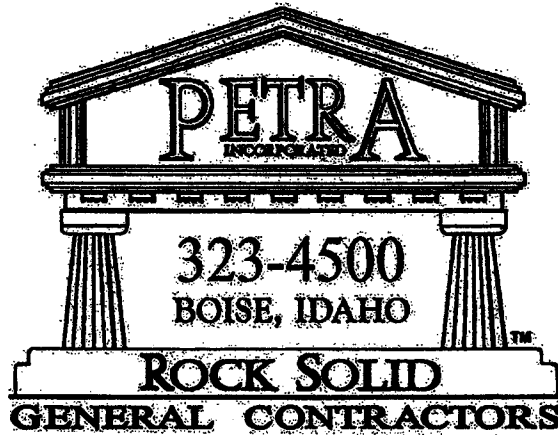


FIG. 4 Sketches of Types of Fracture

If you have questions concerning this report (cmu5758), please contact us immediately.

Respectfully submitted,  
MATERIALS TESTING & INSPECTION INC.

Reviewed by: George DuPont  
Corporate Construction Services Manager



**FILE COPY**

**Project:** Meridian City Hall  
33 East Idaho Street  
Meridian, Idaho 83642

**Owner:** City of Meridian  
33 East Idaho Street  
Meridian, Idaho 83642

**Architect:** LCA Architects, PA  
1221 Shoreline Lane  
Boise, Idaho 83702

**General Contractor:** Petra, Inc.  
1097 Rosario Street  
Meridian, Idaho 83642

**The Closeout Package for Meridian City Hall, attached hereto has been received and found by the Owner to be complete in accordance with the Contract Documents.**

  
Keith Watts (SIGNATURE)

\_\_\_\_\_  
Purchasing Agent  
City of Meridian

1/29/09  
DATE

  
Eric Jensen (SIGNATURE)

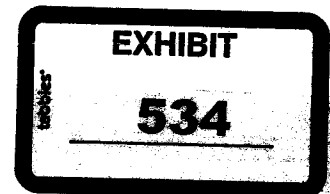
\_\_\_\_\_  
Building Maintenance  
City of Meridian

1-29-09  
DATE

  
Gene Bennett (SIGNATURE)

\_\_\_\_\_  
Project Manager -- Petra, Inc.

1-29-09  
DATE



PETRA63629

006159

**Petra Incorporated**

**TRANSMITTAL**

**No. 00944**

1097 N Rosario St.  
Meridian, Idaho 83642

Phone: 208-323-4500  
Fax: 208-323-4507

**PROJECT:** Meridian City Hall

**DATE:** 2/17/2009

**TO:** City of Meridian  
33 E Idaho Avenue  
Meridian, ID 83642

**REF:** As Build documents  
for Signature

**FILE COPY**

**ATTN:** Eric Jenson

WE ARE SENDING:	SUBMITTED FOR:	ACTION TAKEN:
<input type="checkbox"/> Shop Drawings	<input type="checkbox"/> Approval	<input type="checkbox"/> Approved as Submitted
<input type="checkbox"/> Letter	<input checked="" type="checkbox"/> Your Use	<input type="checkbox"/> Approved as Noted
<input type="checkbox"/> Prints	<input type="checkbox"/> As Requested	<input type="checkbox"/> Returned After Loan
<input type="checkbox"/> Change Order	<input type="checkbox"/> Review and Comment	<input type="checkbox"/> Resubmit
<input checked="" type="checkbox"/> Plans		<input type="checkbox"/> Submit
<input type="checkbox"/> Samples	<b>SENT VIA:</b>	<input type="checkbox"/> Returned
<input type="checkbox"/> Specifications	<input checked="" type="checkbox"/> Attached	<input type="checkbox"/> Returned for Corrections
<input checked="" type="checkbox"/> Other: ASI & RFI books	<input type="checkbox"/> Separate Cover Via:	<input type="checkbox"/> Due Date:

ITEM NO.	COPIES	DATE	ITEM	NUMBER	REV. NO.	DESCRIPTION	STATUS
0001	2					As Build Drawings for Phase II - Core & Shell	
0002	2					As Build Drawings for Phase III - TI Finish & MEP's	
0003	2					As Build Drawings for Phase IV - Site Work & Plaza	
0004	2					As Build Drawings for Phase V - East Parking Lot	
0005	2					As Build Drawings for Phase VI - Interior Signage	
0006	2					RFI Books (2 sets of 1 thru 230)	
0007	4					ASI Books (2 sets of 1 thru 168)	
0008	2			34 pages ✓		As Build Drawings From Buss Mechanical - Plumbing	
0009	2			39 pages ✓		As Build Drawings from Hobson - HVAC	
0010	2			14 pages ✓		As Build Drawings from Simplex Grinnell - Fire Sprinkler	
0011	2			52 pages ✓		As build Drawings from Tri-State - Building Electrical	
0012	2			37 pages ✓		As build Drawings from Tri-State - Plaza/Site Electrical	

**Remarks:**

*[Handwritten Signature]*

**CC:**

**Signed:** \_\_\_\_\_

Jack Vaughan

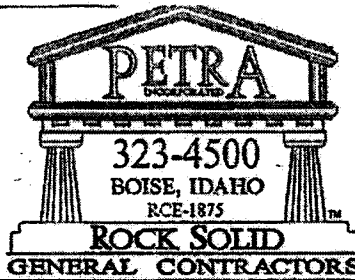
Expedition ®



PETRA61293

*CL062007*

006160



TRANSMITTAL  
No. 01004

FILE COPY

1097 N. ROSARIO STREET • MERIDIAN, ID 83642 • PHONE: (208) 323-4500 • FAX: (208) 323-4507

**PROJECT:** Meridian City Hall # 060675 **DATE:** 8/4/2009  
**TO:** City of Meridian  
33 E Broadway Avenue  
Meridian, ID 83642 **REF:** Punchlist Sign Off  
**ATTN:** Tom Johnson **PHONE:** 208-378-9650  
**FAX:** 208-378-9660  
**CELL:** UNAVAILABLE

WE ARE SENDING:	SUBMITTED FOR:	ACTION TAKEN:
<input type="checkbox"/> Shop Drawings	<input type="checkbox"/> Approval	<input type="checkbox"/> Approved as Submitted
<input type="checkbox"/> Letter	<input type="checkbox"/> Your Use	<input type="checkbox"/> Approved as Noted
<input type="checkbox"/> Prints	<input type="checkbox"/> As Requested	<input type="checkbox"/> Returned After Loan
<input type="checkbox"/> Change Order	<input checked="" type="checkbox"/> Review and Comment	<input type="checkbox"/> Resubmit
<input type="checkbox"/> Plans		<input type="checkbox"/> Submit
<input type="checkbox"/> Samples	SENT VIA:	<input type="checkbox"/> Returned
<input type="checkbox"/> Specifications	<input type="checkbox"/> Attached	<input type="checkbox"/> Returned for Corrections
<input type="checkbox"/> Other:	<input type="checkbox"/> Separate Cover Via:	<input type="checkbox"/> Due Date:

ITEM NO. COPIES DATE ITEM NUMBER REV. NO. DESCRIPTION STATUS

1 1 8/4/2009 Punchlist Sign Off Sheet

**Remarks:** Please see attached punchlist sign off sheet for your signature. Please return to Petra, Inc.

Thank you!

Barb



CC:

Signed: Barb

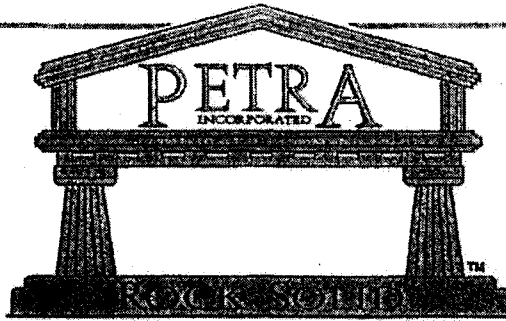
Barb Crawford

Expedition ©

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PETRA 893631





GENERAL CONTRACTORS & CONSTRUCTION MANAGEMENT

**Project:**

Meridian City Hall  
33 East Broadway  
Meridian, Idaho 83642

**Owner:**

City of Meridian  
33 East Broadway  
Meridian, Idaho 83642

**Architect:**

LCA Architects, PA  
1221 Shoreline Lane  
Boise, Idaho 83702

**General Contractor:**

Petra, Inc.  
1097 N. Rosario  
Meridian, Idaho 83642

The punchlist for Meridian City Hall, attached hereto and dated 11/07/06, has been reviewed and found by the General Contractor, Architect and Owner to be complete in accordance with the Contract Documents.

\_\_\_\_\_  
OWNER (REPRESENTATIVE)

\_\_\_\_\_  
BY (Tom Johnson, Public Works)

\_\_\_\_\_  
DATE

\_\_\_\_\_  
ARCHITECT

\_\_\_\_\_  
BY (Steve Christensen)

\_\_\_\_\_  
DATE

Petra, Inc.  
CONSTRUCTION MANAGER

Gene Bennett  
BY (Gene Bennett, Sr. Project Manager)

7-29-08  
DATE

1097 N. ROSARIO ST. • MERIDIAN, ID 83642 • PHONE: (208) 323-4500 • FAX: (208) 323-4507

WWW.PETRAINC.NET  
RCE-1873

P608A93632

# Meridian City Hall

## Exterior Punch List

Updated: 6/02/09 per 6/1 walk with COM & LCA

Item number	Responsible Contractor	Location	Item	Date Complete
1	ABM Cleaning	General Note	Clean all exterior glazing	11/2/08
2	ABM Cleaning	General Note	Grout all top sill from building wall/wood	11/2/08
3	ABM Cleaning	General Note	Touch-up concrete each corner below brick veneer continuously all the way around the building	11/2/08
4	ABM Cleaning	General Note	Wash entire building	11/2/08
5	Asisten	General Note	Clean-up concrete pavers finish as it has nice uniform clean appearance throughout	11/2/08
6	TMC Masonry	General Note	Clean mortar from bottom of Arnicraft sill	11/2/08
7	TMC Masonry	Exterior General Note	Cut all wire tubes flush with concrete wall at first floor	6/1/09
8	Western Roofing	Exterior General Note	Schedule roof manufacturing to walk roof to ensure roof watertight	WHY ISSUED
9	Boat Mechanical	General Note	Increase height of overhew roof drainings by four inches	10/23/08
	Sealco	Exterior General Note	Provide sealant where all trim buckle steel plates meet brick veneer to provide weather tight construction.	Extra Not PL compl 4/21
10				
11	RB Welding	Site Work Gen/Note	All exposed fasteners shall be stainless steel and/or type to resist rusting	11/2/08
12	Sealco	Site Work Gen/Note	Remove old strip and install sealant	12/22/08
13	TMC Masonry	East Elevation	Re-point in mortar at sill cap at gridline J-1.	DEC 31/2
14	TMC Masonry	East Elevation	Remove and replace cracked mortar at gridline J-3.	6/1/09
15	TMC Masonry	East Elevation	Re-point mortar just east of gridline J-3, about two feet up from north window at same gridline.	6/1/09
16	TMC Masonry	East Elevation	Re-point in mortar above Arnicraft stone sill at second floor at gridline J-4	DEC 31/2
17	TMC Masonry	East Elevation	Re-point in masonry at brick veneer between two northern windows at second floor south of gridline J-4.	DEC 31/2
18	TMC Masonry	East Elevation	Re-point in mortar at the north elevation of gridline J-4 below stone sill.	6/1/09
19	TMC Masonry	East Elevation	Re-point entire joint at gridline J-4 just above sill cap.	6/1/09
20	TMC Masonry	East Elevation	Re-point mortar joint at gridline H-3 below first brick band at Arnicraft stone.	6/1/09
21	TMC Masonry	East Elevation	Re-point mortar surround to brick sill at gridline H-4.5, point above first floor window.	6/1/09
22	TMC Masonry	East Elevation	Clean-up mortar bed where Arnicraft stone meets foundation wall near gridline H-4.5.	6/1/09
23	TMC Masonry	East Elevation	Re-point mortar where brick veneer meets Arnicraft stone at gridline H-6.	6/1/09
24	Sealco	East Elevation	Complete sealing of all doors, steps, and other elements at main entry canopy.	1/2/09
25	Sealco	East Elevation	Re-point mortar around light fixture at main building entry column to fill in installed level.	10/23/08
26	TMC Masonry/Ridge Sp	East Elevation	Remove brick in north from brick above foundation wall above first floor window.	6/1/09
27	TMC Masonry	East Elevation	Re-point in mortar at building corner of gridline J-5.	6/1/09
28	ABM Cleaning	East Elevation	Clean all aluminum storefront at main entry	12/2/08
29	Amisco Wall Covering	East Elevation	Fill hole at bottom of joint trim at gridline J-6.5.	10/23/08
30	Custom Glass	East Elevation	Install aluminum trim piece at head of entry doors to conceal exposed framing.	10/23/08
31	Tru-Shut	East Elevation	Install missing light fixture at gridline H-7.	10/23/08
32	ABM Cleaning	East Elevation	Remove white debris off of brick veneer adjacent to gridline H-7.	1/2/09
33	Sealco	East Elevation	Provide sealant where floor slab protrudes brick veneer at gridline H-7.	1/2/09
34	TMC Masonry	East Elevation	Re-point mortar at main building entry at building sign location.	6/1/09
			Re-point in missing mortar at Arnicraft stone at the plan north of gridline H-7 at numerous locations including right at the first level fill band and above and below second floor brick accent band and above first floor brick accent band.	
35	TMC Masonry	East Elevation	Re-point masonry at gridline H-6 at first floor.	6/1/09
36	TMC Masonry	East Elevation	Re-point mortar at gridline H-4.5, also clean Arnicraft reveal all the way up to the north of the third window bay from the gridline 7.	6/1/09
37	TMC Masonry	East Elevation		6/1/09

7/2/2009 9:14 AM

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PETRA93633

006163



# Meridian City Hall

## Exterior Punch List

Updated: 6/02/09 per 6/1 walk with COM & LCA

Item number	Responsible Contractor	Location	Item	Date Complete
38	TMC Masonry	East Elevation	Clean mortar off bottom of decorative cornice pieces at gridline H-9 in running east to west near parapet cap between H and J.	6/1/09
39	TMC Masonry	East Elevation	Re-point in mortar at gridline J-9 at first floor level.	6/1/09
40	TMC Masonry	East Elevation	Provide sealant at first floor masonry lintel at gridline H-9 -- CALL TO PR-7712	6/1/09
41	TMC Masonry	East Elevation	Clean up mortar joint at first floor building level at gridline 9 between H and J to provide new sleek uniform appearance.	6/1/09
42	TMC Masonry	East Elevation	Clean mortar off of east side of brick veneer at gridline L-9	6/1/09
43	TMC Masonry	East Elevation	Clean mortar from bottom of decorative bay window cornice at gridline H-9 adjacent to parapet.	6/1/09
44	TMC Masonry	East Elevation	Clean white residue from underneath all brick between gridlines J between 9 and 10.	6/1/09
45	ABM Cleaning	East Elevation	Re-point in mortar at cornice corner of gridline J-9 above first floor solid courses	6/1/09
46	TMC Masonry	East Elevation	Re-point in mortar at gridline J-11 above decorative foundation wall	6/1/09
47	TMC Masonry	East Elevation	Remove mortar from northern aluminum lamp at office 160 located at gridline J-12	6/1/09
48	TMC Masonry	East Elevation	Re-point in mortar above second floor window located second window from north corner.	6/1/09
49	Roll Steel	East Elevation	On northmost aluminum, it looks like northern turnbuckle is not tight and needs to be tightened so it tions	6/1/09
50	TMC Masonry	East Elevation	Re-point in masonry at gridline J-12 north below first floor window sill.	6/1/09
51	TMC Masonry	East Elevation	Remove nail from decorative brick veneer at gridline H between gridlines 3 and 4	6/1/09
52	TMC Masonry	East Elevation	Re-point in mortar of parapet cap at gridline H between 3 and 4 and at numerous locations above parapet	6/1/09
53	TMC Masonry	East Elevation	Cap below where nail has been installed	6/1/09
54	TMC Masonry	East Elevation	Initial mortar joint north of parapet cap, gridline H.	6/1/09
55	TMC Masonry	East Elevation	Re-point in mortar at gridline 4 continuously up to parapet cap.	6/1/09
56	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
57	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
58	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
59	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
60	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
61	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
62	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
63	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
64	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
65	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
66	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
67	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
68	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
69	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
70	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
71	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
72	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
73	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
74	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09
75	TMC Masonry	East Elevation	Re-point in mortar at window to be at gridline H south of access door.	6/1/09



# Meridian City Hall

## Exterior Punch List

Updated: 6/02/09 per 6/1 walk with COM & LCA

Item number	Responsible Contractor	Location	Item	Date Complete
76	Rule Steel	South Elevation	Remove grill from middle sunshade steel fascia and repaint.	6/1/09
77	Rule Steel	South Elevation	Replace bent turnbuckle and tie rod at east sun shade.	6/1/09
78	TMC Masonry	South Elevation	Remove plastic at gridline G and H under main window sill.	6/1/09
79	TMC Masonry	South Elevation	Remove mortar from decorative soldier course above Window J at gridline J-1.	6/1/09
80	TMC Masonry	South Elevation	Re-point in mortar at gridline G at south second floor roof above center window at Anticraft stone and brick veneer.	6/1/09
81	TMC Masonry	South Elevation	Trim back vinyl flashing at northmost window sill.	6/1/09
82	TMC Masonry	South Elevation	Re-point in mortar above westmost window at Anticraft stone.	6/1/09
83	Sealed	Roof 27	Provide a vent where roof membrane slope at window sill.	6/1/09
84	Western Roofing	Roof 27 and Fir South	Trim vinylized flashing back from westmost window so it lines up with Anticraft stone.	OK - 6/1/09
85	TMC Masonry	South Elevation	Clean mortar off of roof membrane at south face of stay tower.	6/1/09
86	Western Roofing	Roof 27	Re-work where second floor parapet under roof stay tower to provide a clean waterproof detail.	OK - 6/1/09
87	AX Plus	West Elevation	Stucco exposed foundation wall adjacent to generator and pedestrian ramp.	No per Kelton
88	TMC Masonry	West Elevation	Re-tilt masonry adjacent to southwest exit door at gridline F-2.	6/1/09
89	TMC Masonry	West Elevation	Re-work and replace sill block adjacent to column line F-2.	6/1/09
90	TMC Masonry	West Elevation	Re-tilt and mortar at brick decorative soldier course above sill at gridline F-2.	OK
91	Flow Steel & Corn Paint	West Elevation	Paint steel at southmost sunshade needs to be cleaned, made smooth and repainted.	10/2/09
92	Rule Steel	West Elevation	Remove black stain from brick at center window behind generator.	1/2/09
93	TMC Masonry	West Elevation	Remove black flashing above sunshade device at gridline F-2.	6/1/09
94	Boss Mechanical	West Elevation	Secure overflow drain properly with correct fasteners right behind generator.	10/2/09
95	Tru-Slate	West Elevation	Provide sealant at all foundation penetrations of condensing and discharging ventlines.	10/2/09
96	TMC Masonry	West Elevation	Re-haul masonry underneath sill block at column line F-3.	6/1/09
97	TMC Masonry	West Elevation	Re-point mortar at gridline D-4 to north of second floor window.	6/1/09
98	Tru-Slate	West Elevation	Look at the center light fixture by the sprinkler door to ensure it is installed straight.	10/2/09
99	Commercial Painting	West Elevation	Re-align the spray gun soon after and provide additional coat of paint on door and frame.	6/1/09
100	ABS Doors	West Elevation	Confirm door sweep installation at the sprinkler room door.	10/2/09
101	Sealed	West Elevation	Secure the pump test fittings.	10/2/09
102	Boss Mechanical	West Elevation	Install overflow from overflow downspout penetration adjacent to screen wall at southwest corner.	10/2/09
103	Commercial Painting	West Elevation	Paint to match exterior wall buffers.	6/1/09
104	TMC Masonry	West Elevation	Clean excessive mortar from underneath sill block at second floor windows.	6/1/09
105	TMC Masonry	West Elevation	Re-work in mortar underneath soldier course at window head at second floor window at south side of radius.	6/1/09
106	Tru-Slate	West Elevation	Complete electrical box at south flashing well.	10/2/09
107	Asbestos	West Elevation	Continuing concrete jacking of all exposed concrete wall on entire west elevation.	10/2/09
108	Boss Mechanical	West Elevation	Install roof drain overflow from all both western columns.	10/2/09
109	TMC Masonry	West Elevation	Remove black vinyl flashing along column line A right at brick lintel above third story windows.	6/1/09
110	Sealed	West Elevation	Complete jacking of concrete wall where concrete wall meets bottom of brick veneer continuously all along west elevation.	OK - 6/1/09
111	Tru-Slate	West Elevation	Complete electrical box on the north curve.	10/2/09
112	Custom Glass	West Elevation	Provide sealant and/or bent flashing down at the second window, first floor from along the west radius, second window from the north.	OK
113	Boss Mechanical	West Elevation	Install overflow roof drain at gridline D-9.	10/2/09
114	TMC Masonry	West Elevation	Re-point in mortar above main soldier course at gridline D-10.	10/2/09
115	Boss Mechanical	West Elevation	Complete installation of fasteners at overflow drain at gridline F-11.	10/2/09

7/2/2009 9:14 AM

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PETRA93635

006165



Mayor Tammy de Weerd  
City Council Members:  
Keith Bird  
Brad Hoaglund  
Charles Rountree  
David Zarembo

February 24, 2009

Jerry S. Frank, CEO  
Gene Bennett, Project Manager  
Petra Incorporated  
1097 N. Rosario Street  
Meridian, ID 83642

**RE: Change Order #2 Regarding Additional City Hall CM Fees**

Dear Jerry and Gene:

Thank you for your patience during our research into your fee request. While we want Petra to be fairly compensated for its management of the Meridian City Hall project, our first priority is our obligation to the citizens of Meridian to assure good stewardship of their tax dollars.

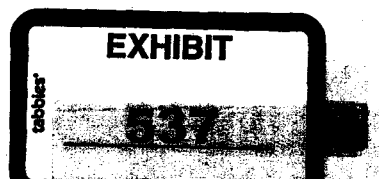
Our analysis of your fee request must necessarily begin with a review of the Agreement for Construction Management Services. As you know, this Agreement was negotiated over a number of weeks with each party availing itself of legal representation so that the terms and conditions of the Agreement would be fully understood. Through the Agreement, the City endeavored to create a relationship with its Construction Manager whereby the Project would be managed in the City's best interests.

Article 7 of the Agreement allows for an equitable adjustment in the Construction Manager's Fee if significant change to the Project *materially affects Construction Manager's services*. Petra is requesting additional fees as the result of increases in Project size, complexity, and budget. Petra and the City have been exchanging letters regarding this fee request since November 5 of 2007. The City has reviewed the additional substantiation provided by Petra on October 3, 2008 and we are still not convinced that the factors cited by Petra have *materially affected* the construction management services provided.

Article 4.2 of the Agreement required that Petra work with the Architect to "prepare and submit to the Owner a written report detailing its understanding of the Owner's Criteria and identifying any design, construction, budgetary, operational or other problems or recommendations that result from Owner's Criteria." To our knowledge, this important contractual provision was never satisfied. This requirement was included in the Agreement because the City believed that it was critical to establishing control of the Project and that having a documented understanding would enable all team members to achieve the goals and be accountable for the outcome.

RFP No 1, Item # 8

Petra Loan  
CITY  
MCH  
CITY



006166 Petra92462

Jerry S. Frank, CEO  
Gene Bennett, Project Manager  
February 24, 2009  
Page 2

Without having a documented understanding of the Owner's Criteria as required by Article 4.2 of the Agreement, it is difficult for the City to evaluate Petra's claim for additional construction management fees based on "increased complexity." The "increased complexity" of some of the building components may have resulted in additional time required by the contractors hired to install them, but the City is not convinced that the final building design should have necessitated additional construction management time.

The Owner's Objectives as stated in Article 3.1 of the Agreement were "to develop a new cost efficient city hall facility and public plaza on the Site." Recital "B" stated the City's desire to construct a "four story structure of with approximately 80,000 square feet of standard Class A office space." As constructed, the Project does indeed contain the envisioned amount of office space on three floors; while the final design does not include a fourth floor, it does include a largely unfinished basement. The City contends that substituting an unfinished basement for a finished fourth story does not represent a material change in scope or complexity of the Project. Furthermore, the City contends that a structure built to "stand the test of time" should be considered standard construction for a City Hall building. Finally, the systems included in the final design may be considered "state of the art" by some, but they have become standard design for public buildings based on long-term cost efficiencies.

The Agreement set the Construction Manager's fee as a flat fee, not a percentage of the project budget. The City continues to maintain its position that simply applying the fee to a budget increase is unacceptable. Furthermore, the additional substantiation provided by Petra fails to specifically justify how the increase in budget has materially affected the services delivered by the construction management team. Did Petra provide any additional services based solely on the increased budget, and if so, how did those additional services affect Petra's home office overhead costs?

Further, Article 7 of the Agreement requires that any equitable adjustment be mutually agreed upon prior to the Construction Manager providing any additional services based on notice from the Construction Manager of the proposed change in service. The City had settled on the floor system and HVAC specifications by the end of February, 2007. The matter of the basement and the need to raise the entire structure four feet was settled at the City Council meeting of April 10, 2007. Despite the fact that the design of the building was settled early in the year 2007, the notice of intent to submit a change order was not submitted by Petra until November 5, 2007 and the actual change order request was not submitted until April 4, 2008. The City is not convinced that Petra has fulfilled the contractual responsibility of asking for and receiving approval to perform additional work, nor was any additional compensation authorized.

Jerry S. Frank, CEO  
Gene Bennett, Project Manager  
February 24, 2009  
Page 3

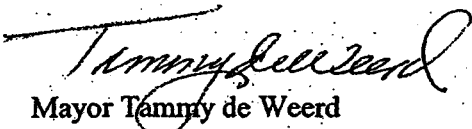
Article 2.1.4 of the Agreement requires that the "Construction Manager shall prepare all documents and provide all services required under this Agreement in such a manner that increases in Project costs resulting from Construction Manager's errors or omissions do not exceed one percent (1%) of the total construction price of the Project." Based on the final budget of \$20.4 million, this amount would be \$204,000. The City has not yet had an opportunity to conduct a complete analysis of all change orders on the Project, so we are not yet convinced that this contractual requirement has been met. This provision of the Agreement is relevant to Petra's request for additional salary costs. Until the change orders have been analyzed, the City has no way of knowing whether any of the additional salary costs are related to errors or omissions in management of the Project.

The City is concerned that the numerous staff changes on the Project may have had an effect on the need for additional staff hours. Project Engineer Wes Bettis left the Project in November of 2007 and was replaced with Tom Coughlin. The Project Superintendent listed in the Agreement (Gene Landon) was replaced with Jon Anderson early on in the Project, and Anderson was replaced with Jack Vaughan in April of 2008. The City questions whether the turnover in critical construction management staff may have resulted in the need for additional hours on the job for which the City should not be held responsible.

Based on the foregoing, the City has determined that we must continue to deny Petra's request for additional compensation as outlined in Change Order #2.

If you would like an opportunity to address the City Council in executive session, let us know and we will place this matter on the next available agenda.

Sincerely,

  
Mayor Tammy de Weerd

Purchasing Manager Keith Watts



  
Council President Charlie Rountree

  
City Attorney Bill Nary

## INSPECTION REPORT / REPAIR FOR WARRANTY

**Applicator:**  
WESTERN ROOFING CO, INC  
2609 KEIM LN

**Job Name:** MERIDIAN CITY HALL  
**Location:** MERIDIAN, ID 83642  
**Owner:** CITY OF MERIDIAN

**NAMPA, ID 83687**  
**Rep** DIVISION 7 SPECIALTIES, INC.

**System**  
796 MFMT-TPO

**Material:**  
.045 VW

**Sq. Ft:**  
25,100

**Job #:** 1062949      **Completion Date:** 10/13/08  
**Date:** 09/23/2009      **FS Rep:** SCOTT REES  
**Inspection #:** 1      **Approved:** No      **EB:** N

**Attending Roofer:** MIKE  
**Reinspect:** Y

**Rating:** 7

**REPAIRS REQUIRED:** The entire roof should be checked to make sure it meets Versico Specifications and Details. Below are some of the repairs that must be made. To ensure proper splicing prior to making repairs all membranes and flashings must be cleaned with soap and water, rinsed and dried then follow proper splicing procedures.

### RFW Repair Items:

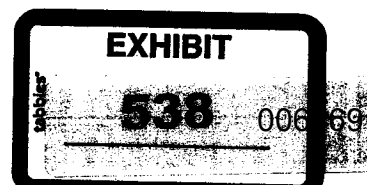
- R1030** Holes/cuts/tears in membrane/flashing, damage by others. Repair: Apply surface splices with like material.
- T004** Cold weld/Wrinkles in hot air weld field seam. Repair: Apply heat to hot air weld mating surfaces together or apply a surface splice extending 1 1/2" to 2" in all directions past cut area. Apply Cut-Edge Sealant to exposed scrim edges.
- R1033** Non-reinforced surface splice in field of roof. Repair: Overlay with reinforced membrane (like material) extending 1-1/2 in. minimum in all directions past the edge of the existing surface splice.
- R1039** Membrane unadhered. Repair: Cut open membrane, peel back and readhere with VersiWeld Bonding Adhesive. Overlay all cuts with reinforced membrane extending 1-1/2 in. minimum in all directions past all cut or open area.
- R1051** VWMA-2.1. Tented seam fasteners, fasteners still secure into deck. Repair: Cut hole in membrane at fasteners, tighten fasteners down, then overlay with 6 in. reinforced membrane or 6 in. QA Cover Strip.
- T002** VW-9. Missing termination at edge of membrane. Repair: Install appropriate termination per VW-9 details.
- R1070** C-6.2; Hole in membrane cut too small. Repair: Cut opening in membrane larger than drain pipe below to allow proper drainage and not restrict water flow.
- R1010** VW-8. Missing clamp and/or WCOM. Repair: Loosen clamp if necessary, apply WCOM between boot and pipe if necessary, then apply clamp as per detail VW-8.
- R1032** Debris under membrane. Repair: Remove debris and overlay with reinforced membrane extending 1-1/2 in. minimum in all directions past all cut or open area.
- T016** VW-8B/C; Field fabricated pipe seal missing deck flange/vertical wrap of VersiWeld Flashing. Repair: Apply a deck flange of VersiWeld Flashing and/or a vertical wrap of VersiWeld Flashing achieving all minimum hot air weld requirements.
- T022** VW-6; Non-reinforced flashing used in drain. Repair: Remove flashing and install field membrane (like material) in drain according to VW-6 specifications.
- T007** VW-8.1/2, VW-16.1/2; Missing additional membrane securement maximum 12" away from the penetration. Repair: Install additional 2" Polymer Plates/ 2" Seam Fastening Plates maximum 12" away from the penetration and overlay per VersiWeld specifications.
- T011** Membrane securement missing at roof perimeters/inside angle changes greater than 2:12 slope/curbs. Repair: Install 2" Polymer Plates/ 2" Seam Fastening Plates and overlay per VersiWeld specifications.

I hereby represent, with full intention that Versico justifiably rely hereupon in the issuance of its warranty, that the project described above now conforms in its entirety with all Versico specifications, details and installation instructions.

**REPAIRS COMPLETED ON:**

**SIGNATURE:**

Versico and VersiWeld are trademarks of Carlisle Corporation





# **Inspection Report between September 22, 2009 and September 25, 2009**

Job Number	Job Name/City/State	Drawing Number	Inspection Date	Job Rating	Approved Reject Flag	Re-Inspect Flag	Inspection Number	FSR Name	RFW Issue Date
<b>Roofer Name: WESTERN ROOFING CO, INC</b>									
1061116	FEDERAL WAY 4 & 5, BOISE, ID	AB#1061116	09/23/2009	9	Rejected	NO	1	SCOTT REES	09/23/2009
	<b>RFW Code</b>	<b>RFW Description</b>							
	R1055	Missing enhancement at overhead doors/large openings. Repair: Install HPVX Fasteners and 2 3/8 in. plates as per the specified criteria for this project and overlay with 6 in. reinforced membrane or 6 in. QA Cover Strip.							
1062949	MERIDIAN CITY HALL, MERIDIAN, ID	AB#1062949	09/23/2009	7	Rejected	YES	1	SCOTT REES	09/23/2009
	<b>RFW Code</b>	<b>RFW Description</b>							
	R1030	Holes/cuts/tears in membrane/flashing, damage by others. Repair: Apply surface splices with like material.							
	T004	Cold weld/Wrinkles in hot air weld field seam. Repair: Apply heat to hot air weld mating surfaces together or apply a surface splice extending 1 1/2" to 2" in all directions past cut area. Apply Cut-Edge Sealant to exposed scrim edges.							
	R1033	Non-reinforced surface splice in field of roof. Repair: Overlay with reinforced membrane (like material) extending 1-1/2 in. minimum in all directions past the edge of the existing surface splice.							
	R1039	Membrane unadhered. Repair: Cut open membrane, peel back and readhere with VersiWeld Bonding Adhesive. Overlay all cuts with reinforced membrane extending 1-1/2 in. minimum in all directions past all cut or open area.							
	R1051	VWMA-2.1. Tented seam fasteners, fasteners still secure into deck. Repair: Cut hole in membrane at fasteners, tighten fasteners down, then overlay with 6 in. reinforced membrane or 6 in. QA Cover Strip.							
	T002	VW-9. Missing termination at edge of membrane. Repair: Install appropriate termination per VW-9 details.							
	R1070	C-6.2; Hole in membrane cut too small. Repair: Cut opening in membrane larger than drain pipe below to allow proper drainage and not restrict water flow.							
	R1010	VW-8. Missing clamp and/or WCOM. Repair: Loosen clamp if necessary, apply WCOM between boot and pipe if necessary, then apply clamp as per detail VW-8.							
	R1032	Debris under membrane. Repair: Remove debris and overlay with reinforced membrane extending 1-1/2 in. minimum in all directions past all cut or open area.							
	T016	VW-8B/C; Field fabricated pipe seal missing deck flange/vertical wrap of VersiWeld Flashing. Repair: Apply a deck flange of VersiWeld Flashing and/or a vertical wrap of VersiWeld Flashing achieving all minimum hot air weld requirements.							
	T022	VW-6; Non-reinforced flashing used in drain. Repair: Remove flashing and install field membrane (like material) in drain according to VW-6 specifications.							
	T007	VW-8.1/2, VW-16.1/2; Missing additional membrane securement maximum 12" away from the penetration. Repair: Install additional 2" Polymer Plates/ 2" Seam Fastening Plates maximum 12" away from the penetration and overlay per VersiWeld specifications.							
	T011	Membrane securement missing at roof perimeters/inside angle changes greater than 2:12 slope/curbs. Repair: Install 2" Polymer Plates/ 2" Seam Fastening Plates and overlay per VersiWeld specifications.							

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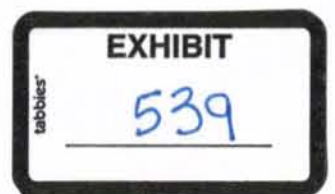
RFP 1201

PROJECT SUMMARY/RECAP PREPARED BY KEITH WATTS - COM 4 APR 2008

FILE COPY

CITY HALL PROJECT / CONSTRUCTION PROGRESSION

DATE	MEETING TITLE	ATTENDEES	NOTES	BUDGET	COMPLETION DATE
7/11/2006			City Entered into agreement with LCA to design a new City Hall.		
8/1/2006			City entered into an agreement with Petra for Construction Management of an 80,000 square foot \$12,200,000 building.	\$12,200,000.00	
8/24/2006	ASBESTOS TESTING	Watts, (Wes)	I met with Wes and MTI to let them into the creamery for asbestos testing. MTI stated that the results should be back in 1 1/2 weeks. I expect to go out for demo bid around 9-7-06.		
9/18/2006	First Meeting	Mayor, Jerry Frank, Keith Bird, Wes Bettis, Steve Simmons, Russ, Ted, Will, Watts	Simmons stated that the site plan took longer than expected. He will have 2 ext elevations to propose on 9-27-06. I asked LCA when plans would be ready for bidding. Russ stated Jan. 07 at best.		
9/20/2006			DEMOLITION IS OUT TO BID		
9/20/2006	PROJECT KICK OFF MTG.	Ted, Wes, Simmons, Watts, Bird	I asked Wes to provide a Project Schedule and Project Budget. I provided Wes a procurmeent schedule that I had used on previous projects. Bird asked Wes to provide Petra's Safety manual that they will be using. <b>Wes stated that the Project Schedule will change weekly until the Pre-Construction Demo work is completed.</b>		
9/26/2006	DEMO & ABATEMENT PRE-BID MEETING	Watts, Buird, Will, (Wes, Adam), (Christensen)	Wes & myself conducted the Pre-Bid Meeting.		
10/2/2006	INT. PROJECT MTG.	Mayor, Ted, Brad Watson, Wes, Watts	Mayor asked me to provide Petra (Wes) a checklist of their responsibilities. Ted stated the City will use a modified AIA agreement. Brad stated that the Broadway Sewer Project will happen in Winter of 2006. Wes stated that the wells found on the site are a separate issue from the demo of the site.		
10/4/2006	PROCUREMENT PROCESS MTG.	Ted, Will, Wes, Watts	We discussed the bid process. I asked Wes to get me a bidders list for Shell & Core. I asked if the SWPP Plan had to be complete prior to demo of the creamery. Wes stated no.		



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## CITY HALL PROJECT / CONSTRUCTION PROGRESSION

DATE	MEETING TITLE	ATTENDEES	NOTES	BUDGET	COMPLETION DATE
10/5/2006	DEMO & ABATEMENT BID OPENING		DEMOLITION BIDS OPENED		
10/5/2006	BLDG. DESIGN MTG.	Mayor, Bird, Will, Brad, Ted, Watts, (Wes), (Rex & Mark)	Structure design (shell & core) is to be completed by mid February 2006.		
10/9/2006	INT. PROJECT MTG.	Watts, Brad, Will, Ted, Bird	Brad stated that the sewer plans were complete and into DEQ. Ted stated that the modified AIA agreement will be ready in December 06. I stated I would call the Demo Contractor to establish start and completion dates.		
10/10/2006	COUNCIL MTG.		COUNCIL AWARDS DEMOLITION CONTRACT		
10/16/2006	INT. PROJECT MTG.	Watts, Mayor, Bird, Brad, Will	Brad advised us of Ed Squires findings. Brad will contact Wes to discuss the abatement of the wells. The Mayor wants a discussion on the Demo schedule. I stated that I need to contact David of Ideal for his Demo schedule then forward to Ted for use I the agreement. Ted stated that he will work with the Mayor and UP to get the Sq. Ft. price down on the leased land to the south.		
10/23/2006	INT. PROJECT MTG.	Watts, Bird, Shelly, Ron Coulter, Sharon, Ted, (Wes), (Simmons)	Discussion on the Ground Breaking Ceremony. Wes stated that there should be only 2 bid packages. Elk Mountain is the Civil Engineer for the project. Bird asked that Wes have Elroy (Parks) look at the trees along the south end of the property to see if they could be removed for the IP trench. Ted stated that he is still working on the UPR Lease.		
10/30/2006	INT. PROJECT MTG.	Watts, Mayor, Will, Brad, (Wes)	Mayor stated that the Ground Breaking Ceremony will be 11/13 @11:00. The Mayor asked me to get pricing on improvements for the Parks Building for a possible trade with Andrews Upholstery for parking and present at the 11/18/06 Executive Session. Mayor asked Wes to get pricing on a sky bridge from City Hall across Meridian Rd. Will stated he thought we might need a large trash compactor.		
11/6/2006	INT. PROJECT MTG.	Watts, Mayor, Ted, Bird, Brad, Will, Shelly, (Russ), (Wes)	Wes stated that he attended LCA Design Team Meeting. Heat pumps are not feasible because of the water demand. A design presentation is scheduled for November 20th. The Geotech needs to drill 3 holes. Wes is look to MTI to quote the transite panels.		



## CITY HALL PROJECT / CONSTRUCTION PROGRESSION

DATE	MEETING TITLE	ATTENDEES	NOTES	BUDGET	COMPLETION DATE
11/13/2006	INT. PROJECT MTG.	Watts, Bird, Brad, Will, Ted, (Wes), (Simmons)	Will stated that the Mayor took channel 6 around the site on Sunday. Don Nelson of Channel 6 will be the MC at the ceremony today. Brad stated that he found documentation for 4 wells on the site. The S.E. corner well is the newest and is 515' deep. I informed the group that I have Change Order #1 to Ideal for Asbestos removal ready. <b>Simmons stated that we will need 160 parking stalls, therefore we have significant parking issues.</b> Will and myself once again stressed the need for parking. Wes stated that Dave Buich plans on being under construction on his property by March.		
11/13/2006	***		GROUND BREAKING CEREMONY		
11/20/2006	SHELL & CORE MTG. @ POLICE	All	LCA presented colors and materials. The Mechanical Engineer present HVAC which is 2 rooftop units. There was discussion on if we want to make City Hall an EOC.		
11/27/2006	INT. PROJECT MTG.	Watts, Mayor, Ted, Brad, Will, (Wes)	Wes stated that they will break down the bids into several bid packages. Power is now stubbed on the site. He will be meeting with IP today to finalize design. Ted he is keeping pressure on Jim Larson (UP) for a new price. Mayor stated that LCA is to continue to push for LEED Certification. Certification will be done as an extra if we can afford it.		
11/27/2006	WELLS MTG.	Watts, Brad, (Wes), (Ed)	Ed stated he is working on specs & a bidders list. He will have this by the end of the week (12/1/06). I stated that I could have bids out by the 4th if he gets me the specs by the 30th. We agreed on the following dates: Bids due 12/7, to Council 12/12, Bonds and Insurance 12/29 and NTP on 1/2/07. Ed stated that he thinks there are approx. 7 wells on the site.		
12/4/2006	INT. PROJECT MTG.	Watts, Ted, Will, Brad, Terry, mayor, (Wes)	Ted suggested that we sign UPR's lease in the amount of \$1,400 and continue to negotiate a more reasonable fee. <b>Wes stated that Shell &amp; Core drawings are anticipated to be ready 2/13/07.</b> We will be able to bid footing foundations, windows-Doors. 30 days later we can bid Elect. Mechanical & TI. Brad stated the the sewer project should start the first of the year but he has some budget concerns. Wes reminded the group that if the sewer is delayed the Demo will be delayed as well and we will incur additional fees.		

## CITY HALL PROJECT / CONSTRUCTION PROGRESSION

DATE	MEETING TITLE	ATTENDEES	NOTES	BUDGET	COMPLETION DATE
12/5/2006	CITY COUNCIL MEETING	Watts, (Simmons & Wes presented)	Steve stated that he has met with all departments. Floor plans are designed but not firm. Fountain has changed. Steve presented a more detailed elevation with beveled stone and brick accents and gave a brief presentation of the floor plans. Wes stated that the Demo was going well. The boiler room was abated. The creamery building will be down this Saturday 12/9. There will be a water truck on site tomorrow 12/6. <b>Shell &amp; Core Bid packages will be going out _____ if plans are completed by 2/13/07.</b> The Mayor stated that they would like LEED Certification but not going to hold up design. The Mayor asked Ted to bring Certification to City Team Meeting (Int. Project Mtg.) on Monday Morning.		
12/11/2006	INT. PROJECT MTG.	Watts, Mayor, Bird, Ted, Will, Terry, (Wes), (Simmons)	Simmons brought 2 guys in from Herry to discuss LEED Certification and commissioning including training of City Staff (Maint. Person). I asked Simmons for an estimate for LEED Certification and he est. 0.80 Sq. Ft. Ted asked Wes what their LEED person would be and to see if there would be any duplication. Wes stated that there would be no duplication and that his person is essentially a second set of eyes. Simmons stated that he has seen Buich's proposed plans.		



## CITY HALL PROJECT / CONSTRUCTION PROGRESSION

DATE	MEETING TITLE	ATTENDEES	NOTES	BUDGET	COMPLETION DATE
12/18/2006	INT. PROJECT MTG.	Watts, Ted, Terry, Will, Shelly, Brad, (Wes)	Wes stated that the west foundation wall of the creamery is supporting Meridian Rd. and Ideal would like to leave it until start of construction. They will come back at no charge to remove at that time. Terracon was on site last week & should have results this week. Wes asked Brad when the sewer project start. Brad stated it should start in January. He would like to have a Dept. Report on water rights at a future Council Meeting. The Mayor asked if we had heard from LCA on the cost of LEED. Will stated that he would contact them. The Mayor asked how important the floor plans were (for bidding the Shell & Core). Wes stated that they were not crucial to the Shell & Core. The current schedule has them to be ready in Mid January which is ahead of the Mid Feb orig. estimate. The Mayor stated that she has concerns of the Bid Date of Mid March. She asked Wes if this was later than originally discussed. Wes stated that the lag in bid time was due to the Geotechnical and TOPO information which is yet to come in. Ted stated that we sit down with LCA to nail it down and get a realistic date and worst case scenario. Wes also stated another part of the lag was due to the additional 3 weeks the design team took in producing the site layout. I stated that the only open concern I have at the moment was the abandonment of the wells. Brad stated that he was meeting with Ed today.		
12/19/2006	CISCO PHONE DEMO	Watts, Terry, David T., Karie, Sharon, Ron, Nancy			
1/2/2007	INT. PROJECT MTG.	Watts, Mayor, Sharon, Bird, Ted, Brad	Mayor asked if the LEEDs agreement was wrapped up. I let her know I would call LCA and check. Bird stated that they would dlive with the August 08 completion date. Brad stated that the sewer project was award and the contract is pending. Bird stated that he would like to look at the bricks when Ideal is off site, and possibly get parks to clean and stack. I asked if I was to continue to put all invoices on the consent agenda. Bird stated no. Bird asked how the well abandonment was moving along. Brad stated that he sent me a hard copy of the info. I stated that I do have an envelope from Ed. Mayor asked Sharon to have Will get with LCA to provide an electronic file of revised plans, elevations, Plaza & floor plans. Mayor asked Brad if they have kept the Idaho Truss Co. informed of the sewer project. Brad stated the Kyle is on it.		

August 1, 2008

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## CITY HALL PROJECT / CONSTRUCTION PROGRESSION

DATE	MEETING TITLE	ATTENDEES	NOTES	BUDGET	COMPLETION DATE
1/8/2007	INT. PROJECT MTG.	Watts, Bird, Brad, Ted, Will, (Wes)	I brought up Ideals request to release their bond and retention. Ted agreed to release 95% of bond, no retention. Ted asked if we had found any fuel tanks as he smelled fumes. Bird asked if we had found a Civil. Wes stated that he is still chasing them down. Ted stated that he is drafting the UPR agreement and he should have in 2 weeks. Wes stated that there is a firm wanting 10,000 bricks. Brad stated that Kyle has scheduled a Pre-Con for the septic line for the 17th. Wes stated that the design team is moving forward and his team will have a budget for stone and brick on concept drawings. Wes stated that they are having trouble getting 3 bids an on the private side right now.		
1/10/2007	INT. BID MEETING	Watts, Mayor, Ted, Bill, Will (Wes, Gene) (Simmons)	Ted reviewed the modified AIA agreement with us. Wes submitted 6 copies of their Construction Management Plan. <b>Gene stated that his budget est. of \$15,475,160 is over our \$12,200,000.</b> He believes a lot of it to be in g the skin of the building (brick & Stone), also the mechanical is \$10.00 a square foot over their est. from the Blue Cross building. Simmons asked Gene if he could come to their Design Team Meeting tomorrow to present. Gene stated that no one in Idaho can do a Brick and Stone job of this size. Simmons stated that they will have the Mech. Engr. look at options. I asked if the options would be LEED acceptable. Simmons stated yes. Simmons suggested shrinking the basement by 1/2. <b>Bird stated the cost did not surprise him and he would proceed as he thought we could find the extra \$2,275,000.</b> The Mayor asked for options to get the cost down to \$14,000,000. Bird asked if the plans were 60% complete. <b>Simmons stated that the Shell &amp; Core were 60% complete.</b> Bird asked Wes how long he would leave bids out. Wes stated Gene extended the building bid time frame to a full month with Pre-Bid 5 days after issue. The Mayor asked Brad how the sewer was coming. Wes stated the project has been delayed until the 1st of April because the POT plant is down until April 1 & ACHD will not allow cold patch. The Mayor asked Brad if we were set with the wells. Brad let her know when bids have been received. I let them know that we only received one bid and I would de-mail Brad and Ed today.	\$15,475,160.00	

*EXCLUDES  
SINE REMEDIAL  
PLANS  
C. Man - Peter*



## CITY HALL PROJECT / CONSTRUCTION PROGRESSION

DATE	MEETING TITLE	ATTENDEES	NOTES	BUDGET	COMPLETION DATE
1/29/2007	INT. PROJECT MTG.	Watts, Brad, Will, (Wes, Gene, Art)	Brad stated that ACHD is putting together a coordinatino meeting. Wes will attend the Pre-Con. Brad asked me about the wells. I let Brad know that Ed is in the process of scheduling and that I will get the award on Council 2-6-07. Wes delivered 60% plans for shell & core. They will start Pre-Advertising. LCA will turn in CZC next week. <b>Petra to submit Shell &amp; Core permit on 2-19-07.</b> Gene stated that he is having a meeting next Wed. 2-28-07 to compile a budget and list of valaue engineering. He will forward to committee prior to the next meeting on 3-12-07. <b>Wes stated that the 100% Shell &amp; Core drawing are due 2/14/07.</b> Brad has requested a meeting with Simmons but ahs not received a response. Will said he will follow up. Wes stated that Simmons needs Department Direction.		
2/12/2007	INT. PROJECT MTG.	Watts, Mayor, Bird, Ted, Will, (Jerry, Gene, Wes) (Simmons)	Simmons stated that the site package is due in a couple of days and the TI soon after. I gave a run down of contamination. Wes presented an updated schedule, <b>Shell &amp; Core bids will be issued 2/23/07.</b> The Mayor asked about Abandonment and Water Rights. Brad stated that Ed is good to go with abandonment. He did state that they have not started yet. Gene asked for a technical contact & Bird asked Brad to be the point man. Brad agreed to be the point man. Gene passed out a new budget. Simmons stated the electrical had been designed for total build out. He asked if he could cut back. Bird gave him the ok. Gene stated that he value engineer to reduce \$3 million deficit. The skin has been reduced but mechanical is still over. They will meet this week to VE. We will meet tomorrow @ PW to review. The Mayor has heard bad things RE: the access flooring and HVAC system. Jerry is pushing for changing the HVAC Sys. <b>Bird stated he is not willing to make drastic changes because one guy has said he does not like it.</b> We need to get feedback from a building that has need in operation for at least a year. Jerry stated that Wes and Gene will be available for the time allowed per the contract. <b>Gene stated the the budget has gone up \$800,000 due promarily to MEP costs vs. the enginers estimates</b>		

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## CITY HALL PROJECT / CONSTRUCTION PROGRESSION

DATE	MEETING TITLE	ATTENDEES	NOTES	BUDGET	COMPLETION DATE
2/26/2007	INT. PROJECT MTG.	Watts, Bird, Ted, Will, (Gene, Wes), (Simmons)	Bird asked if we have 3' of space above the false ceiling if we have a raised floor. Ted informed the Mayor that we can call references for the raised floor but advised not to base our decision on those references. We need to base our decision on advice of our CM and Architect. Simmons stated that theoretically, if fall is installed properly we should have no issues. Gene stated that we could save \$812,000 through value engineering. Listed are other options for savings. Wes went through all options including removing the south wing and basement. <b>The Mayor stated that the Council has expressed that they want a full building as designed.</b> Bird stated that we need to stay with the footprint and need to decide if we stay with access flooring and asked when we will have plans. Simmons went through steps if we do not keep floor as is. Wes went through Ideal's excavation proposal of \$82 - \$83 a CU. YD. Bird instructed me to move forward with the c/o for Ideal and again asked when plans will be ready. <b>Simmons stated plans will be ready Friday 3/2.</b>		
2/27/2007			CHANGE ORDER NO. 2 IS ISSUED TO IDEAL FOR CONTAMINATED SOIL FOUND ON SITE.		
3/6/2007	CONST. MTG.	Watts, Brad, (Wes, Adam, Gene) (Christensen)	<b>Wes stated that the bid package is in production and should be ready to go out Wednesday 3-8-07</b>		
3/12/2007	PROJECT MTG.	Watts, Ted, Will, (Gene, Wes, Adam, Jon) (Simmons)	I gave a run down on the well situation. Wes stated that soil contamination needed direction. Ted stated that he needed to talk with ACHD and he will talk with Bill. Jon suggested MTI for contamination. <b>Wes stated that the Shell &amp; Core is out to bid and the Pre-Bid is Wednesday 3/14/07.</b> Gene stated that he will issue an Addendum to clarify de-watering, Waterproofing. He said that Dewatering is looking like a \$100,000 deal. Simmons has a proposal for design of de-watering @15,000. Gene stated that he needs to get ACHD to buy into letting us use the storm drain. Simmons stated that they will be ready to present 2 color schemes next week. Will is scheduling the next Dept. Meeting on the 26th. Simmons would like to meet sooner with the Dept. Heads to review counter options. Will will schedule the 20th. Bid came in late and stated he does not want to give up the basement.		



## CITY HALL PROJECT / CONSTRUCTION PROGRESSION

DATE	MEETING TITLE	ATTENDEES	NOTES	BUDGET	COMPLETION DATE
3/12/2007	CONST. MTG.	Watts, Brad, (Gene, Wes, Jon, Adam) (Simmons)	Gene stated that the Pre-Bid is Wed. @2:00 and Wes will conduct. Temp. De-watering engineering is figured out but he still needs to get Nampa Meridian Irr. Dist. Approval. We need to sleeve under Meridian Rd. Simmons stated that he would need 3-4 weeks for design time if we eliminate the basement at this point. Brad stated the real issue is weather we can get permits. Gene stated that we need to turn the de-water engineer loose to track down permits for de-watering. Jon stated that MTI will have a quote to us this afternoon for boring under the road and soil samples. Gene suggested ins. limits should be set at \$1 Million. I suggested a different amount for different packages up to \$5mill. Brad stated that Ed Squires is to have the well abandonment completed by early April.		
3/13/2007	DE-WATER MTG.		Gene gave report. 60' @ approx \$40K for 1/4 mile. The \$40K can be absorbed in the current budget as temp. const. costs. The 12" line will run approx. \$50K. Warren has Prelim. Ok by Nampa Meridian Irr. He will talk with the Core this week and report on Monday. Est. of \$130K - \$200K for perm. De-Water Sys.		
3/13/2007	EXEC. SESSION	Watts, Ted, Bird, Borton, Roundtree, Zaremba	Discussion of Oil Contamination. Council gave me the direction to proceed with a \$90K change order with Ideal Demo. For further excavation and abatement. I created the CO on 3-14-07 and had Joe sign.		
3/19/2007	PROJECT MTG.	Watts, Bird, Mayor, Brad, Will, (Wes, Jon, Adam, Art)	Discussion on dewatering for the basement. Jon stated that 1,500 cubic yards of contaminated soil has been removed to date. Wes stated that the S&C bid due date will be extended to April 3rd to allow more time for bid circulation, we have not had the interest Petra had hoped for. Steel suppliers are stating steel is in short supply once again..		
3/26/2007	INT. PROJECT MTG				
3/26/2007	CONST. MTG.				
	WOODEN WELL		Ideal gave Ed Squires all the info on the discovery of the wooden well. They fished all the material out. The square is approx. 5' sq. MTI took a sample and Ed wants to pump it out and explore.		
4/2/2007	INT. PROJECT MTG.				

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## CITY HALL PROJECT / CONSTRUCTION PROGRESSION

DATE	MEETING TITLE	ATTENDEES	NOTES	BUDGET	COMPLETION DATE
4/23/2007	INT. PROJECT MTG.	Watts, Bird, Brad, Will, Ted, (Jon, Gene, Wes, Adam) (Simmons)	Jon stated that no soil was removed last week. We will hold off on Ideals CO #5 until we get the report on soil samples taken. Gene stated that we need a joint meeting with MTI, Hydro Logic, City & Petra and dwell closures. Bird gave a NOT-TO-EXCEED approval of \$11K for brick clean up. Gene stated that the Pre-Con for Shell & Core is May 2nd at the trailer. ACHD may impose Impact fees of up to \$500K. Simmons stated that they will try to soften. I stated that I need a cash flow projection from Petra. Gene stated that the next bid package should be out May 22. Simmons explained why he needs A/V and Security by the end of this week. Gene asked Simmons to get with Foundation (concrete contractor) for changes and send contracts to Gene.		
4/23/2007	CONST. MTG.	Watts, Brad, (Gene, Jon) (Christensen)	Gene stated that they will start moving dirt (construction) on May 7th. Christensen stated that he had an ASI that will give new finished floor elevation. Jon stated that he needs to get const. power. We will provide power to everyone but welders. Pre-on is May 2nd @ 1:30. City will hire Labor Ready for brick clean up.		
4/30/2007	INT. PROJECT MTG.	Watts, Mayor, Bird, Brad (Wes, Gene, Jon) (Christensen)	Wes provided me a cash flow projection and signed contracts. Cash flow will double in Oct. Nov. & Dec. Jon stated that we have a well closure procedure. Simmons stated that he has issued ASI #2. Bird wanted to confirm that we will be 4' out of the water with the basement. He was assured by Simmons. Mayor asked how to landscape on Meridian Rd. LCA has some ideas. Jon stated that the Broadway sewer project was paving this week. Mayor asked Brad if they could publish the Main/Meridian Rd. closure. Gene stated that there is no Penta or MEK which means contamination is coming from somewhere else not the site. We still need to put in monitoring wells. Simmons stated that ACHD has not provided an invoice yet.		
5/7/2007 <i>5/24/07</i>	SHELL & CORE PRE-CONSTRUCTION MTG.				
5/8/2007	CONSTRUCTION BEGAN				
6/11/2007			I received a new schedule		July 21, 2008

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# CITY HALL PROJECT / CONSTRUCTION PROGRESSION

DATE	MEETING TITLE	ATTENDEES	NOTES	TOTAL PROJECT BUDGET	COMPLETION DATE
6/18/2007			I received a new schedule		July 25, 2008 OK
6/22/2007					July 21, 2008 OK
7/16/2007					July 28, 2007 OK
8/1/2007					August 8, 2008 OK
9/17/2007					August 29, 2008 OK
10/31/2007				\$21,022,210.00	
11/5/2007				\$20,122,460.00	August 29, 2008
12/12/2007	MONTHLY MTG.			21.6 \$19,896,103.00	August 29, 2007
1/8/2008	MONTHLY MTG.			21.6 \$19,896,103.00	
2/12/2008	MONTHLY MTG.			21.6 \$20,447,605.00	October 10, 2008
3/11/2008	MONTHLY MTG.			\$20,473,605.00	August 29, 2008
4/8/2008	MONTHLY MTG.			\$20,473,605.00	October 16, 2008

**EXHIBIT #####****CITY COUNCIL CONTRACTS / CHANGE ORDER APPROVALS****Meridian City Hall Project**

<b>CONTRACTS - Approved by City Council</b>	<b>Phase</b>	<b>Amount</b>	<b>Council Appl</b>
AAtronic, Inc	3 FF&E	\$ 204,378.72	10/23/07
ABM Janitorial	3 FF&E	\$ 13,900.00	8/5/08
Alpha Masonry	4	\$ 194,585.00	12/11/07
American Wallcover, Inc	2 Ext Frame	\$ 363,287.00	4/10/07
American Wallcover, Inc	3 Rough Carp	\$ 112,000.00	7/17/07
American Wallcover, Inc	3 Drywall	\$ 1,038,550.00	7/17/07
American Wallcover, Inc	4	\$ 8,400.00	4/8/08
Anvil Fence Company	4	\$ 18,934.00	10/30/08
Apex Integrated Security Solutions, Inc	3 FF&E	\$ 84,695.00	10/23/07
Architectural Building Supply	2	\$ 7,820.00	4/10/07
Architectural Building Supply	3	\$ 277,230.00	7/17/07
Axelsen Concrete Construction LLC	4	\$ 296,200.00	4/8/08
B&B Steel Erectors, Inc (Suncrest Corp dba)	3	\$ 73,265.00	7/17/07
Buss Mechanical Services, Inc	3	\$ 953,385.00	7/17/07
Cobblestone Construction Inc	4	\$ 75,462.00	4/8/08
Commercial Painting, Inc	3	\$ 151,275.00	7/24/07
Commercial Painting, Inc	4	\$ 11,400.00	4/8/08
Crawford Door Company	3	\$ 5,590.00	7/17/07
Custom Glass	2	\$ 295,321.00	4/10/07
Custom Glass	3	\$ 68,678.00	7/17/07
Designer Floors	3	\$ 182,354.00	7/17/07
Hobson Fabricating Corporation	3	\$ 2,060,000.00	7/17/07
Idaho Custom Wood Products	3	\$ 464,000.00	7/17/07
Ideal Demolition	1	\$ 390,800.00	10/10/06
Integrated Interiors	3	\$ 11,900.00	7/17/07
KB Fabrication & Welding, Inc.	4	\$ 130,450.00	12/11/07
The Masonry Center	3	\$ 20,840.00	7/17/07
MJ's Backhoe & Excavation, Inc	2	\$ 610,314.00	4/10/07
M.R. Miller, Inc	4	\$ 216,775.00	4/8/08
M.R. Preist dba Advanced Sign	3 FF&E	\$ 42,954.29	6/17/08
Pac-West Interiors, Inc	3	\$ 528,800.00	7/17/07
Paige Mechanical Group, Inc	4	\$ 29,064.00	12/11/07
Pro-Tech Roofing, Inc	4	\$ 10,495.00	4/8/08
Precision Communications dba TTE-PreCom	3 FF&E	\$ 219,000.00	10/23/07
Rule Steel Tanks, Inc	2	\$ 1,847,000.00	4/10/07
SBI Contracting, Inc	3	\$ 110,000.00	7/17/07
Schindler Elevator Corp	2	\$ 222,100.00	4/10/07
Schumacher & Company, Inc	3	\$ 110,953.00	7/17/07
Seal Co.	2&3	\$ 67,182.00	7/17/07
Seal Co.	4	\$ 3,028.00	4/8/07
Sidewalks LLC	2	\$ 655,595.35	4/10/07
Simplex-Grinnell, LP	3	\$ 412,879.00	7/17/07
Sunshine Landscape	4	\$ 199,678.75	12/11/07
Terra-West	4	\$ 338,000.00	12/11/07
TMC Inc	2	\$ 1,584,760.00	4/10/07
Tri State Electric	3	\$ 2,749,895.00	7/17/07
Tri State Electric	4	\$ 344,090.00	12/11/07
Western Roofing	2	\$ 182,990.00	4/10/07
		\$ 18,000,253.11	
MCH CM Agreement - Petra		\$ 853,812.00	8/1/06
<b>TOTAL CONTRACTS AWARDED</b>		<b>\$ 18,854,065.11</b>	

**EXHIBIT**

006182

## Meridian City Hall Project

### CHANGE ORDERS BY PHASE

CM Change Orders CO#1	\$ 52,502.00	Note 1
Phase 1 - Demo & Abatement	\$ 529,147.02	Note 1
Phase 2 - Cold Core & Shell	\$ 598,992.08	Note 1
Phase 3 - Tenant Improvements & MEP	\$ 500,147.09	Note 1
Phase 4 - Plaza	\$ 176,763.00	Note 1

APPROVED CHANGE ORDERS	\$ 1,857,551.19
	<u>\$ 20,711,616.30</u>

### OTHER BUDGET ITEMS

LEED Allowance	\$ 205,000.00	Note 2
MCH General Conditions Reimbursables - P2 & P3	\$ 362,058.00	
Contingency Balance	\$ 117,287.83	

	\$ 684,345.83
TOTAL MCH APPROVALS	<u>\$ 21,395,962.13</u>

### COMPARISON - BUDGET TO APPROVED CONTRACTS & CHANGE ORDERS

PROJECT BUDGET	BUDGET	APPROVALS	DIFFERENCE
MCH	\$21,773,078.00	\$ 21,395,962.13	\$ 377,115.87
Budgeted Amount Original CO#2 Request			\$ 376,808.00
		Balance Rem	<u>\$ 307.87</u>

### NOTES:

- 1 All contractor change orders were approved by the Meridian City Council on various dates
- 2 The cost for the LEED Certification were approved by the city council.



ORIGINAL

NO. \_\_\_\_\_ FILED \_\_\_\_\_ 329  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

SEP 13 2010

J. DAVID NAVARRO, Clerk  
By E. HOLMES  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB NO. 8276)  
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Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, AN IDAHO  
MUNICIPAL CORPORATION,

Plaintiff,

v.

PETRA, INCORPORATED, AN IDAHO  
CORPORATION. ,

Defendant.

Case No. 09-07257

**AFFIDAVIT OF THOMAS G.  
WALKER DATED SEPTEMBER 13,  
2010**

STATE OF IDAHO )  
                          ) ss.  
County of Ada     )

I, THOMAS G. WALKER, being first duly sworn upon oath, depose and state:

1. I am one of the attorneys of record for the Defendant/Counterclaimant, Petra Incorporated ("Petra"), in the above entitled action and I make this affidavit based on my own personal knowledge of the facts set forth herein.

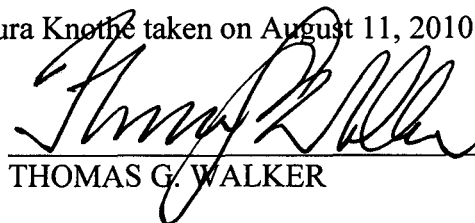
2. I submit this affidavit in support of Petra's Opposition to Motion for Leave to File First Amended Complaint and Add Claim for Punitive Damages Pursuant to Idaho Code § 6-1604.

3. I am one of the custodians of records of Cosho Humphrey, LLP, which include memoranda, legal documents, reports, correspondence, emails, records, research and data compilations, in various forms that are kept in the course of Cosho Humphrey, LLP's regularly conducted business activity, and which are made and maintained as the regular practice of Cosho Humphrey, LLP.

4. Attached hereto as Exhibit "A" is a true and correct copy of relevant excerpts from the transcript of the deposition of Steven J. Amento taken on August 17, 2010.

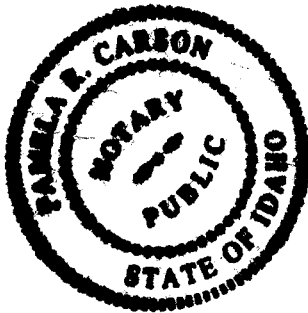
5. Attached hereto as Exhibit "B" is a true and correct copy of relevant excerpts from the transcript of the deposition of Todd Weltner taken on August 18, 2010.

6. Attached hereto as Exhibit "C" is a true and correct copy of relevant excerpts from the transcript of the deposition of Laura Knothe taken on August 11, 2010.

  
THOMAS G. WALKER



SUBSCRIBED AND SWORN to before me this 13<sup>th</sup> day of September, 2010.



Pamela R. Carson

Notary Public for Idaho

Residing at Eagle, Idaho

My commission expires: March 31, 2016.

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 13th day of September, 2010, a true and correct copy of  
the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Overnight Courier
- ☐ Facsimile
- ☐ E-mail:

Thomas G. Walker  
THOMAS G. WALKER

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation, )  
) Case No. CV OC 0907257  
)  
Plaintiff/Counterdefendant, )  
)  
vs. )  
)  
PETRA INCORPORATED, an Idaho )  
corporation, )  
)  
Defendant/Counterclaimant. )

AUDIO-VISUAL DEPOSITION OF STEVEN J. AMENTO  
August 17, 2010  
Boise, Idaho

Janet French, CSR #946, RPR

## INDEX

## EXAMINATION

STEVEN J. AMENTO	PAGE
By: Mr. Walker	5

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263. Affidavit of Steven Amento in Opposition to Defendant's Motion for Summary Judgment (463 pages)	30
268. Steve Amento's file produced in response to the duces tecum (1838 pages)	77
264. Request for Statement of Qualifications (6 pages)	159

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## AUDIO-VISUAL DEPOSITION OF STEVEN J. AMENTO

BE IT REMEMBERED that the deposition of  
STEVEN J. AMENTO was taken by the Defendant/  
Counterclaimant at the offices of Cosho Humphrey, LLP,  
located at 800 Park Boulevard, Suite 790, Boise,  
Idaho, before Associated Reporting, Inc., by Janet  
French, a Court Reporter and Notary Public in and for  
the County of Ada, State of Idaho, on Tuesday, the  
17th day of August, 2010, commencing at the hour of  
9:05 a.m. in the above-entitled matter.

## APPEARANCES:

For the Plaintiff/ TROUT JONES GLEDHILL FUHRMAN, P.A.  
Counterdefendant: By: Kim J. Trout, Esq.  
225 North 9th Street, Suite 820  
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Facsimile: (208) 331-1529  
ktrout@idalaw.com

For the Defendant/ COSHO HUMPHREY, LLP  
Counterclaimant: By: Thomas G. Walker, Esq.  
800 Park Blvd., Suite 790  
Post Office Box 9518  
Boise, Idaho 83707-9518  
Telephone: (208) 344-7811  
Facsimile: (208) 338-3290  
twalker@cosholaw.com

Also Present: Tom Coughlin  
Richard Kluckhohn

Page 2

09:05:52	1
09:05:52	2
09:05:57	3
09:06:00	4
09:06:03	5
09:06:06	6
09:06:09	7
09:06:13	8
09:06:16	9
09:06:20	10
09:06:23	11
09:06:24	12
09:06:26	13
09:06:32	14
09:06:36	15
09:06:40	16
09:06:46	17
09:06:53	18
09:06:53	19
09:06:56	20
09:07:00	21
09:07:02	22
09:07:06	23
09:07:06	24
09:07:07	25

## PROCEEDINGS

MR. WALKER: We are on the record. I'm going to  
do a little recitation here in conformance with Idaho  
Rule of Civil Procedure 30(b)(4), which is required  
for audio-video depositions.

This is the deposition of Steven J. Amento,  
which is being taken on behalf of defendant, Petra  
Incorporated in Case No. CV OC 09-7257 filed by the  
City of Meridian in the District Court of the Fourth  
Judicial District for the State of Idaho in and for  
Ada County.

This deposition is being taken on August  
17th, 2010, commencing at 9:06 a.m. And the  
deposition is being taken before Janet French,  
Associated Reporting, Inc., 1618 West Jefferson,  
Boise, Idaho 83702. And it's being taken at the  
offices of Cosho Humphrey, LLP, at 800 Park Boulevard,  
Suite 790, Boise, Idaho 83712.

I'm Thomas G. Walker of the Cosho Humphrey  
firm, and I'm here representing Petra Incorporated,  
the defendant in this lawsuit. I'm also the operator  
of the audio-visual equipment.

This deposition is being taken in accordance  
with the Idaho Rules of Civil Procedure, and there are

Page 4

1 (Pages 1 to 4)

Associated Reporting Inc.  
208.343.4004

EXHIBIT

"A"

006187

10:28:42	1	that project?	10:31:03	1	A. Yes.
10:28:43	2	A. No.	10:31:06	2	Q. And what was the issue?
10:28:46	3	Q. You were an expert consultant?	10:31:11	3	A. Schedule delay, cost overrun, nonpayment.
10:28:47	4	A. Yes.	10:31:15	4	Q. Do you recall the total value -- the total
10:28:50	5	Q. And what was the size of that project in	10:31:19	5	cost of that project?
10:28:50	6	dollars?	10:31:25	6	A. I think it's in excess of \$50 million.
10:28:53	7	A. I think around 15 or 20 million dollars.	10:31:31	7	Q. And how long ago was that?
10:29:02	8	Q. Square footage would be irrelevant in those	10:31:33	8	A. About six -- six years ago.
10:29:03	9	projects?	10:31:38	9	Q. City of Bellevue, what capacity did you
10:29:06	10	A. Yes. Well, compared to a building square	10:31:41	10	serve the City of Bellevue?
10:29:09	11	footage, yes. It's not comparable.	10:31:53	11	A. You know, now that I think about that, that
10:29:13	12	Q. Thank you. The Ward Street -- or the	10:31:59	12	was a project that my partner primarily handled, so I
10:29:17	13	Washington State Department of Transportation, were	10:32:05	13	talked to him about that. It was -- it was some parks
10:29:21	14	you an expert in that case -- or in that matter or the	10:32:10	14	project -- park and recreational projects, including
10:29:21	15	construction manager?	10:32:10	15	trails.
10:29:24	16	A. That would be -- that would be an expert.	10:32:12	16	Q. How long ago was that?
10:29:27	17	Q. Who did you represent?	10:32:13	17	A. About five years ago.
10:29:34	18	A. Uhm, different contractors of -- Mid	10:32:18	18	Q. And in what capacity did your partner or the
10:29:39	19	Mountain would be one of the clients.	10:32:20	19	firm serve in that matter?
10:29:42	20	Q. When did that occur?	10:32:21	20	A. Represented the contractor.
10:29:46	21	A. Most of those are pretty old. They are	10:32:22	21	Q. As an expert?
10:29:50	22	going to be well over ten years old, now that I think	10:32:23	22	A. Yes.
10:29:50	23	about that.	10:32:26	23	Q. Any other public works projects that you can
10:29:53	24	Q. Okay. And what was the project, the	10:32:27	24	recall?
10:29:55	25	Washington street DOT project?	10:32:33	25	A. In the last five years? I think that's

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10:29:56	1	A. The Washington State?	10:32:35	1	where we started this line of questioning.
10:29:57	2	Q. Washington State.	10:32:39	2	Q. Yeah. You've expanded it to ten years, so
10:30:01	3	A. Several -- several projects: Bridges,	10:32:40	3	that's good.
10:30:06	4	highway realignments and expansions, utility projects.	10:32:42	4	A. Well, I don't -- you know, I don't keep a --
10:30:10	5	Q. What about the Prosser City Hospital	10:32:47	5	I don't commit all this to memory, and as I age, I
10:30:13	6	project? What was -- what capacity did you serve in	10:32:50	6	find that I -- even if I commit them to memory, it's
10:30:14	7	that matter?	10:32:51	7	not always there.
10:30:18	8	A. We were an expert to the contractor in	10:32:54	8	Q. Have you served as a construction manager on
10:30:18	9	Yakima.	10:32:59	9	behalf of a public entity?
10:30:21	10	Q. What was the size of the project and square	10:33:29	10	A. Yeah. There's a remediation project for the
10:30:22	11	footage?	10:33:35	11	Vashon School District for the Vashon Middle School,
10:30:29	12	A. It -- I think it was around 25,000 square	10:33:40	12	and I was a consultant to the school district to
10:30:32	13	foot hospital in Prosser.	10:33:46	13	oversee the work performed by the architect and
10:30:36	14	Q. Is that total building or in addition?	10:33:49	14	contractor during the remediation.
10:30:40	15	A. I think that's the entire hospital project.	10:33:55	15	So even though we didn't have a standard
10:30:43	16	Q. Do you recall the total cost of the project?	10:33:58	16	construction management agreement with the school
10:30:43	17	A. I do not.	10:34:01	17	district, I attended most of the weekly coordination
10:30:46	18	Q. And how long ago was that?	10:34:06	18	meetings and consulted to the school district on
10:30:49	19	A. About somewhere between eight and ten years	10:34:09	19	construction management issues, including invoicing,
10:30:49	20	ago.	10:34:13	20	payment, scheduling, other day-to-day operations.
10:30:53	21	Q. University of Washington, what capacity did	10:34:18	21	Q. And what did the remediation involve?
10:30:56	22	you serve on that project?	10:34:22	22	A. It involved the replacement of the exterior
10:31:00	23	A. We represented the specialty drywall	10:34:29	23	cladding on the school as well as mold remediation to
10:31:01	24	subcontractor.	10:34:31	24	certain exterior walls.
10:31:03	25	Q. As an expert?	10:34:38	25	Q. What was the total cost?

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10:45:01	1	completely removed and replaced.	10:47:36	1	on any projects -- on any new construction projects?
10:45:04	2	Q. Do you recall how long ago that project was	10:48:03	2	A. Yes, we have.
10:45:05	3	constructed?	10:48:06	3	Q. Can you identify those for me, please.
10:45:07	4	A. You mean, originally?	10:48:09	4	A. Yeah. There's -- we did a repair
10:45:09	5	Q. Yes.	10:48:16	5	remediation on the Broadmoor Clubhouse -- Broadmoor
10:45:13	6	A. It's between 10 and 15 years old.	10:48:17	6	Golf Course as a clubhouse.
10:45:15	7	Q. What's the estimated cost of the remediation	10:48:22	7	Q. My question was whether or not of the 15
10:45:17	8	on the Waterfront Project?	10:48:25	8	completed projects you acted as the construction
10:45:20	9	A. It's around 7 million bucks.	10:48:27	9	manager on -- for new construction.
10:45:26	10	Q. With regard to the Mooring -- the Moorings	10:48:29	10	A. I understand. So we performed work for that
10:45:29	11	Condo, that's a remediation project; correct?	10:48:34	11	client, and then in addition to that, we oversaw the
10:45:31	12	A. The Moorings Project, yes.	10:48:37	12	construction of a new driving range for the golf
10:45:35	13	Q. And what is -- what's the remediation there?	10:48:40	13	course -- excuse me, for the golf club.
10:45:38	14	A. It's replacement of the cladding as well as	10:48:43	14	Q. Okay. What was the approximate cost of that
10:45:39	15	the deck membrane.	10:48:46	15	new construction?
10:45:44	16	Q. What about Bell Arts, what's the remediation	10:48:50	16	A. I think it was somewhere between 4 and
10:45:45	17	there?	10:48:51	17	500,000 dollars.
10:45:50	18	A. It's some work in the planters, garage, and	10:48:56	18	Q. And were any structures involved, by that, I
10:45:50	19	also decks.	10:48:58	19	mean buildings?
10:45:55	20	Q. And you don't recall the cost of that, of	10:49:01	20	A. No. It was primarily the driving range and
10:45:56	21	the remediation?	10:49:05	21	that -- and equipment associated with the driving
10:45:59	22	A. The remediation, I think it is around	10:49:06	22	range.
10:46:00	23	\$400,000.	10:49:10	23	Q. Okay. Any other new construction among
10:46:03	24	Q. And the Moorings remediation, do you recall	10:49:14	24	those 15 completed projects in which you acted as
10:46:05	25	the cost of that?	10:49:16	25	construction manager?
Page 73			Page 75		
10:46:08	1	A. It's in excess of 5 million.	10:49:25	1	A. There's a -- well, I don't know if we are
10:46:12	2	Q. The 60-O1 Condo, what's the remediation	10:49:28	2	really construction managers. There is a new
10:46:13	3	there?	10:49:32	3	retaining wall that's completed over in -- or under
10:46:17	4	A. The work that's under way is about 500,000,	10:49:35	4	way -- I think it is almost completed. It's in
10:46:21	5	and there will probably be additional phases after we	10:49:43	5	Redmond at the Trilogy Golf Course where we're
10:46:21	6	are completed.	10:49:49	6	representing Quadrant Homes on that project. But more
10:46:25	7	Q. Okay. Are there any other projects that are	10:49:52	7	as oversight of the repairs and not as the actual
10:46:29	8	under way that you are acting as the CM on --	10:49:54	8	construction manager, so I don't think that --
10:46:32	9	construction manager?	10:49:56	9	Q. Okay. Any --
10:46:42	10	A. There is a small project called 615 Pike.	10:49:58	10	A. -- applies.
10:46:45	11	Q. What does that involve?	10:50:01	11	Q. Any other new construction projects that you
10:46:49	12	A. Some replacement of doors at the exterior	10:50:03	12	can recall that are among those 15 that you've
10:46:52	13	decks.	10:50:05	13	identified as completed?
10:46:55	14	Q. What's the approximate cost of that work?	10:50:07	14	A. No, not that I can think of.
10:46:56	15	A. Less than \$25,000.	10:50:10	15	Q. How about to launch? That was the third
10:47:00	16	Q. Any other projects under way in which you	10:50:14	16	category, and then we'll take a break after we go
10:47:02	17	are acting as the construction manager?	10:50:15	17	through that.
10:47:06	18	A. Yes. You know, I'd have to look at my list.	10:50:17	18	A. None that I can think of.
10:47:09	19	There are some, but I'm drawing a blank right now.	10:50:19	19	Q. Do you have projects that are about to
10:47:12	20	Q. That's fine. With regard to the 15	10:50:21	20	launch that are other than new construction?
10:47:15	21	completed projects, how many of those 15 were new	10:50:21	21	A. Yes.
10:47:18	22	construction?	10:50:22	22	Q. What do they involve?
10:47:23	23	A. I believe all the projects are remediation	10:50:24	23	A. Remediation projects.
10:47:27	24	and repair projects.	10:50:27	24	MR. WALKER: Okay. Let's take five minutes.
10:47:30	25	Q. Have you acted as the construction manager	11:03:21	25	Off the record.
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11:03:21 1 (Recess taken from 10:50 a.m. to 11:03 a.m.)  
 11:03:21 2 (Deposition Exhibit No. 268 marked.)  
 11:03:23 3 MR. WALKER: Back on the record.  
 11:03:27 4 During our break, we had a discussion  
 11:03:31 5 regarding the documents that Mr. Amento brought in  
 11:03:34 6 response to duces tecum in his notice, and we have  
 11:03:40 7 those now in a box, a banker's box, and we've numbered  
 11:03:45 8 the entire box as Exhibit No. 268.  
 11:03:47 9 The court reporter will take those exhibits  
 11:03:50 10 and have them copied for my office as well as  
 11:03:55 11 Mr. Trout's office, and it will include hard copies of  
 11:04:00 12 the documents that are in paper form in the box, and  
 11:04:04 13 also make copies of the disks that are also within  
 11:04:06 14 some of the files in the box.  
 11:04:09 15 If it becomes necessary for reference  
 11:04:13 16 purposes to have the pages of the documents Bates  
 11:04:16 17 numbered, we've agreed we will number them commencing  
 11:04:22 18 the Amento depo and starting with a No. 1.  
 11:04:25 19 Is that satisfactory, Mr. Trout?  
 11:04:28 20 MR. TROUT: Yes. And if Bates numbered, we'd  
 11:04:32 21 like copies of Bates numbered documents provided to us  
 11:04:33 22 as well.  
 11:04:34 23 MR. WALKER: Sure. That's fine. Anything else  
 11:04:38 24 with regard to the document production, Mr. Trout?  
 11:04:40 25 MR. TROUT: Not that I'm aware of.

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11:04:43 1 Q. (BY MR. WALKER) Moving, Mr. Amento, back to  
 11:04:47 2 your resume. You indicate in the resume that you've  
 11:04:49 3 conducted numerous presentations and seminars on  
 11:04:51 4 construction related topics.  
 11:04:54 5 Over the last five years, do you have a list  
 11:04:56 6 of those presentations?  
 11:04:56 7 A. No.  
 11:04:59 8 Q. Can you recall how many of those  
 11:05:03 9 presentations you've made over the last five years?  
 11:05:04 10 A. Probably five or six.  
 11:05:07 11 Q. Generally, what types of topics do you  
 11:05:12 12 discuss -- or do you present at these seminars?  
 11:05:17 13 A. Building enclosure investigation,  
 11:05:22 14 construction dispute resolution, construction cost  
 11:05:28 15 accounting, construction management process on  
 11:05:30 16 building remediation projects.  
 11:05:33 17 Q. Anything else?  
 11:05:36 18 A. No. I think that generally covers it.  
 11:05:39 19 Q. Okay. Moving over then to your education.  
 11:05:41 20 You indicate you have a bachelor's of science degree  
 11:05:43 21 in construction engineering?  
 11:05:43 22 A. Yes.  
 11:05:46 23 Q. And that was awarded by Iowa State  
 11:05:48 24 University in 1978?  
 11:05:49 25 A. Yes.

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11:05:51 1 Q. Do you have any other degrees?  
 11:05:52 2 A. No.  
 11:05:55 3 Q. With regard to licensing and certification,  
 11:05:59 4 what licenses do you presently hold?  
 11:06:01 5 A. None, other than my Washington State  
 11:06:01 6 driver's license.  
 11:06:04 7 Q. Okay. What about certifications, do you  
 11:06:10 8 hold any certifications in the construction industry?  
 11:06:11 9 A. No.  
 11:06:17 10 Q. Within your firm, who is the principal that  
 11:06:19 11 holds the construction manager's license or a  
 11:06:22 12 certificate, whatever they call it in Washington?  
 11:06:26 13 A. Washington does not have a license or a  
 11:06:28 14 certification requirement for construction managers.  
 11:06:32 15 Q. Okay. Does the -- does any -- do any of the  
 11:06:35 16 other principals or employees of the firm hold any  
 11:06:38 17 professional licenses related to the construction  
 11:06:38 18 industry?  
 11:06:43 19 A. Yes. Lisa Moe is a registered architect in  
 11:06:45 20 the State of Washington.  
 11:06:46 21 Q. Anyone else?  
 11:06:58 22 A. No other licenses -- well, let me back up.  
 11:07:09 23 Uhm -- and you included anyone else in the firm, was  
 11:07:10 24 that your question?  
 11:07:13 25 Q. Yes, sir.

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11:07:19 1 A. Adam Bungay has his JD, and he's also an  
 11:07:24 2 employee of our firm. But he's not an acting attorney  
 11:07:27 3 at this time. He's one of our consultants and  
 11:07:27 4 construction managers.  
 11:07:30 5 Q. And he serves in an actual function as a  
 11:07:32 6 construction manager on behalf of the firm?  
 11:07:32 7 A. Yes.  
 11:07:35 8 Q. And I assume from your previous answers, and  
 11:07:39 9 correct me if I'm wrong, that no one in your firm  
 11:07:43 10 holds a construction manager's license in any state?  
 11:07:43 11 A. Not that I know of.  
 11:07:47 12 Q. With respect to you personally, do you hold  
 11:07:51 13 a construction manager's license in any state?  
 11:07:52 14 A. No.  
 11:07:54 15 Q. With regard to the areas of expertise that  
 11:08:03 16 are identified in your resume, how did you gain the  
 11:08:07 17 expertise through training, education, or experience,  
 11:08:10 18 or all three?  
 11:08:10 19 A. All three.  
 11:08:15 20 Q. Okay. We've identified that you have a  
 11:08:18 21 degree in construction engineering. It was awarded in  
 11:08:19 22 1978.  
 11:08:21 23 What other training have you had in the  
 11:08:26 24 areas of expertise that you list in your resume?  
 11:08:31 25 A. Well, from college, I went to work for a

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20 (Pages 77 to 80)

11:20:49	1	Have you told me about all of the projects	11:23:51	1	Q. None of those folks, though, are licensed;
11:20:54	2	that you've worked on that you consider to be of	11:23:55	2	correct -- licensed as construction managers?
11:20:58	3	similar size, scope, and complexity as the Meridian	11:23:57	3	A. In the state of Idaho, that's correct.
11:20:59	4	City Hall project?	11:24:00	4	Q. In any state?
11:21:03	5	A. Well, we really didn't talk about any of the	11:24:01	5	A. That's correct.
11:21:06	6	Hensel Phelps that I worked on while I was an employee	11:24:06	6	Q. Did you review -- did you interview any of
11:21:07	7	at Hensel Phelps.	11:24:10	7	the contractors on the project?
11:21:09	8	Q. Okay. Tell me about those projects.	11:24:15	8	A. Not that I can recall.
11:21:13	9	A. The Denver City Performing Arts Center; the	11:24:19	9	Q. Did you interview any of the vendors on the
11:21:20	10	IBM Silicone production factory -- or production plant	11:24:22	10	project that provided materials or supplies?
11:21:25	11	in Tucson, Arizona; the Flagstaff Wastewater Treatment	11:24:23	11	A. Not that I can recall.
11:21:33	12	Plant; the Conoco Office Tower in Ponca City,	11:24:27	12	Q. I assume, because I don't know, that you
11:21:41	13	Oklahoma; the King County Jail in Seattle; the Steam	11:24:30	13	didn't interview any Petra personnel?
11:21:45	14	Utilador Project in Bremerton, Washington; the Huskey	11:24:30	14	A. I did not.
11:21:59	15	Hospital Expansion Project in Seattle, Washington; and	11:24:40	15	Q. And that would include present and former
11:22:02	16	I think those are the Hensel Phelps projects.	11:24:41	16	employees?
11:22:05	17	Q. Okay. With respect to each of those	11:24:41	17	A. That's correct.
11:22:07	18	projects, did you serve as the principal construction	11:24:44	18	Q. And you also indicate that you talked with a
11:22:10	19	manager on any of the projects?	11:24:46	19	professional architect familiar with the project, and
11:22:15	20	A. Hensel Phelps was the contractor --	11:24:48	20	you named Bill Selvage?
11:22:18	21	construction contractor on all of those projects.	11:24:49	21	A. Selvage, yes.
11:22:23	22	Q. And so the service that you provided was on	11:24:51	22	Q. Any other architects that you discussed this
11:22:27	23	behalf of Hensel Phelps as a general contractor?	11:24:52	23	project with?
11:22:28	24	A. Yes.	11:24:53	24	A. Not that I can recall.
11:22:32	25	Q. And you didn't serve in any capacity on	11:24:55	25	Q. You indicated that you have a registered
Page 89			Page 91		
11:22:36	1	behalf -- while employed by Hensel Phelps as a	11:24:57	1	architect as an employee of your firm; is that
11:22:38	2	construction manager; is that correct?	11:24:58	2	correct?
11:22:45	3	A. No, not as a construction manager, per se.	11:24:58	3	A. Yes.
11:22:50	4	But the tasks carried out on behalf of Hensel Phelps	11:25:01	4	Q. Have you discussed this project with that
11:22:53	5	as a contractor -- or similar to what a construction	11:25:02	5	registered architect?
11:22:57	6	manager does or similar to what Petra did on the	11:25:03	6	A. Very briefly.
11:22:58	7	Meridian City project.	11:25:07	7	Q. Can you remind me of the name, please?
11:23:01	8	Q. Okay. Moving on to paragraph 5, you	11:25:09	8	A. Lisa Moe. That's M-O-E.
11:23:04	9	indicate that you have interviewed members of the City	11:25:12	9	Q. Thank you. And you go on in paragraph 6, in
11:23:08	10	staff, and you've provided me with a list of those	11:25:15	10	addition to a physical inspection, you've reviewed
11:23:13	11	individuals to include Ted Baird, Keith Watts, and	11:25:16	11	photographs of the project during construction.
11:23:14	12	Eric Jensen.	11:25:19	12	Which photographs did you review?
11:23:17	13	Are there any other members of the City	11:25:25	13	A. Uhm, there were a set of photographs that
11:23:19	14	staff that you talked with with regard to this	11:25:30	14	Mr. Corke obtained that were in the file that I
11:23:20	15	project?	11:25:34	15	viewed, and those photographs are in the box of
11:23:22	16	A. Not that I can recall.	11:25:35	16	documents which I brought with me today.
11:23:30	17	Q. Now, you indicate that you also talked with	11:25:39	17	Q. Okay. Are there any photographs other than
11:23:33	18	an independent licensed construction management	11:25:42	18	those in the box of documents that you reviewed with
11:23:33	19	professional.	11:25:43	19	respect to this project?
11:23:35	20	Who is that?	11:25:46	20	A. Not that I reviewed personally, no.
11:23:36	21	A. That would be Laura Knothe.	11:25:49	21	Q. How about anyone else in your firm, did they
11:23:39	22	Q. Any other construction management	11:25:51	22	review any photographs that are not in the box?
11:23:42	23	professionals that you've discussed this project with?	11:25:53	23	A. I don't know. Mr. Corke may have reviewed
11:23:45	24	A. I've discussed it in house with members of	11:25:56	24	others that he didn't print out, so I can't answer
11:23:47	25	my firm.	11:25:57	25	that question.
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13:25:25	1	"The City had a right to rely on Petra's	13:28:07	1	features at the City plaza.
13:25:29	2	representations as to the CM fee before accepting any	13:28:15	2	When did that problem first manifest itself?
13:25:33	3	Phase II bids, Phase III bids, and becoming committed	13:28:15	3	A. I don't know.
13:25:35	4	to the project."	13:28:19	4	Q. How would you characterize the cause of the
13:25:40	5	Review 16, and did I read that correctly?	13:28:21	5	leaking in the water feature?
13:25:40	6	A. Yes, you did.	13:28:30	6	A. Well, it looks like there may be several
13:25:44	7	Q. What facts do you have of your own personal	13:28:36	7	causes. One of the more prime causes has to do with
13:25:47	8	knowledge that the City would have abandoned the	13:28:39	8	an inadequate or omitted water proof membrane
13:25:51	9	project if it had been informed that the CM fee would	13:28:43	9	underneath portions of the water feature. And
13:25:52	10	increase?	13:28:47	10	Mr. Weltner goes into greater detail in his affidavit.
13:25:53	11	MR. TROUT: Object to the form of the question.	13:28:51	11	Q. Did you inspect the water feature when you
13:25:56	12	THE WITNESS: I have no evidence that the City	13:28:53	12	did your site visitation?
13:25:59	13	would have abandoned the project. But certainly Petra	13:28:57	13	A. We walked the water feature and I took some
13:26:05	14	had an obligation to provide timely and accurate	13:28:59	14	photographs, but I did not perform an inspection.
13:26:09	15	information to the City at the time when they knew or	13:29:00	15	Q. Do you know what the plans and
13:26:12	16	should have known.	13:29:04	16	specifications for the water feature included with
13:26:12	17	MR. WALKER: Okay.	13:29:10	17	respect to the basin liner, for lack of a better term?
13:26:14	18	Q. (BY MR. WALKER) In paragraph 17, you	13:29:14	18	A. Not as I sit here.
13:26:19	19	indicate that, "Petra's claim having failed to provide	13:29:20	19	Q. Would it be fair to characterize a cause of
13:26:24	20	a written notice of active interference is a breach of	13:29:23	20	the leaking water feature to a defect in design?
13:26:28	21	the standard of care and a breach of the CMA."	13:29:24	21	MR. TROUT: Object to the form.
13:26:30	22	First of all, how do you know that Petra	13:29:27	22	THE WITNESS: I haven't performed an analysis as
13:26:34	23	failed to provide written notice regarding active	13:29:27	23	to the cause, construction, design, or both.
13:26:35	24	interference?	13:29:29	24	Q. (BY MR. WALKER) With regard to 19(b),
13:26:38	25	A. I have not seen a project record from Petra	13:29:36	25	"Leaking roof (see Knothe affidavit)," when did the
Page 121			Page 123		
13:26:43	1	where they claim that the City engaged in active	13:29:39	1	leaking roof first manifest itself?
13:26:43	2	interference.	13:29:39	2	A. I don't know.
13:26:48	3	Q. In paragraph 18, you recite, "Petra had a	13:29:42	3	Q. Okay. Let me back up to leaking water
13:26:51	4	duty to protect the City from construction that did	13:29:42	4	feature.
13:26:55	5	not meet the plans and specifications under section	13:29:47	5	Did you review the punch list that related
13:26:58	6	4.7.9 of the CMA."	13:29:49	6	to the leaking water feature?
13:26:59	7	Did I read that correctly?	13:29:49	7	MR. TROUT: Object to the form.
13:26:59	8	A. Yes.	13:29:53	8	THE WITNESS: I have looked at punch lists, not
13:27:03	9	Q. What construction are you referring to that	13:29:56	9	specifically related to the water feature, so I don't
13:27:07	10	did not meet the plans and specifications?	13:29:58	10	know. There may have been some water feature issues
13:27:11	11	A. Well, I go on to recite some examples. It's	13:30:01	11	on the punch lists, but I don't recall.
13:27:16	12	not a comprehensive list, but some examples are in	13:30:03	12	Q. (BY MR. WALKER) What are the consequences
13:27:21	13	section 19. The leaks at the water features at the	13:30:10	13	of an acceptance by the owner of an item on the punch
13:27:25	14	front of the property, leaks and related problems at	13:30:12	14	list vis-a-vis the construction manager's
13:27:32	15	the roof, the problems with the HVAC system, the	13:30:13	15	responsibility?
13:27:38	16	missing and inaccessible clean outs in the Weltner	13:30:15	16	MR. TROUT: Object to the form to the extent that
13:27:40	17	affidavit, the tests and operational parts in the	13:30:19	17	it may call for a legal conclusion or assume facts not
13:27:47	18	Weltner affidavit. There's the masonry issues in the	13:30:19	18	in evidence.
13:27:50	19	Weltner affidavit, and there is probably some other	13:30:23	19	THE WITNESS: It generally has no bearing on the
13:27:54	20	issues in the Knothe deposition. I haven't had a	13:30:29	20	construction manager's responsibility, because the
13:27:58	21	chance to read that transcript yet. So those are	13:30:34	21	construction manager's responsibility is stated in
13:27:58	22	examples.	13:30:40	22	the -- in the CMA agreement, and as we find -- and
13:28:00	23	Q. And which transcript are you referring to?	13:30:46	23	also there is statutes in regards to building defects
13:28:02	24	A. Laura Knothe.	13:30:50	24	and the right of an owner to make claim for those
13:28:06	25	Q. Okay. Let's take 19(a), leaking water	13:30:52	25	building defects regardless of whether there was,
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13:30:54	1	quote, acceptance or not.	13:33:42	1	today?
13:30:56	2	Q. (BY MR. WALKER) And which statutes are you	13:33:43	2	A. No.
13:30:57	3	referring to?	13:33:50	3	Q. With respect to 19(a), (b), and (c), are
13:31:01	4	A. Uhm, there would be statutes of repose and	13:33:52	4	these warranty items?
13:31:06	5	also statutes of limitation related to building	13:34:02	5	MR. TROUT: Object to the form.
13:31:11	6	defects, breach of contract. There is certainly in	13:34:05	6	THE WITNESS: Well, to the extent the work is
13:31:14	7	the State of Washington. I assume there are also	13:34:07	7	defective, it needs to be cured. Whether it's cured
13:31:16	8	those same laws in the State of Idaho.	13:34:13	8	under warranty or cured under punch list or cured
13:31:18	9	Q. Have you done an independent search of the	13:34:16	9	however, I don't think the -- whether it is a warranty
13:31:21	10	Idaho Statutes to determine whether those statutes	13:34:20	10	or not it -- they still need to be cured. And the
13:31:23	11	exist in Idaho?	13:34:23	11	City shouldn't have to bear the financial burden of
13:31:24	12	A. I have not.	13:34:24	12	curing those items.
13:31:31	13	Q. I apologize, if I've already asked you this,	13:34:27	13	Q. (BY MR. WALKER) To your knowledge, has the
13:31:35	14	but when did the leaking roof identified in 19(b)	13:34:30	14	City incurred any financial liability for the items
13:31:37	15	first manifest itself?	13:34:33	15	identified in 19(a), (b), and (c)?
13:31:42	16	A. You asked me that, and I said I did not	13:34:34	16	A. Yes.
13:31:43	17	know.	13:34:37	17	Q. And what do you know about that?
13:31:45	18	Q. Okay. Thank you.	13:34:40	18	A. Consulting costs, legal costs to research
13:31:46	19	At paragraph 19(c) you say, "Poorly	13:34:46	19	these, provide opinions, and try to pursue remedies
13:31:51	20	commissioned and malfunctioning HVAC system."	13:34:48	20	and then implement those remedies.
13:31:54	21	Do you know who the commissioning agent was	13:34:53	21	Q. What about the -- in pursuing the remedies,
13:31:57	22	with respect to the HVAC?	13:34:57	22	how did the City go about pursuing the remedies?
13:31:58	23	MR. TROUT: Object to the form.	13:35:02	23	A. They first attempted to do their own self
13:32:09	24	THE WITNESS: Well, there's -- Heery's name has	13:35:05	24	diagnosis, and then they brought in professionals to
13:32:12	25	surfaced as a company responsible for the	13:35:06	25	help them do that.
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13:32:15	1	commissioning, however, there is no report that I've	13:35:09	1	Q. And did the City contact the prime
13:32:17	2	seen that would document the commissioning that was	13:35:13	2	contractors as it relates to these three items on page
13:32:19	3	performed or not performed.	13:35:15	3	7 of your affidavit?
13:32:21	4	Q. (BY MR. WALKER) Do you know who hired Heery	13:35:19	4	A. In regards to the roof, I know that when I
13:32:22	5	International?	13:35:23	5	was there in October, the roofing contractor was there
13:32:23	6	A. I do not.	13:35:26	6	actually performing some work, so I assume that the
13:32:29	7	Q. What evidence do you have to support your	13:35:31	7	City or somebody on the City's behalf contacted them.
13:32:35	8	conclusion that the HVAC system is malfunctioning?	13:35:35	8	As for the other systems, I'd have to defer
13:32:39	9	A. Well, there's evidence in an affidavit that	13:35:38	9	to the City and Ms. Knothe.
13:32:44	10	60 some or more of the dampers that actually control	13:35:41	10	Q. Okay. With -- specifically, with regard to
13:32:48	11	the air were physically restrained from actually	13:35:46	11	the leaking water feature at the City plaza, are you
13:32:52	12	modulating. There's evidence of control problems.	13:35:48	12	aware of whether or not the City requested warranty
13:32:58	13	There's evidence that employees inside the facility	13:35:52	13	work by the construction -- or by the contractor that
13:33:01	14	need space heaters in the summer to keep warm because	13:35:54	14	built the water feature?
13:33:04	15	the air-conditioning system does not work properly.	13:35:56	15	MR. TROUT: Object to the form of the question.
13:33:08	16	Physically, when I was at my meeting in	13:35:57	16	THE WITNESS: I do not know.
13:33:12	17	October, we were inside a conference room, and the air	13:35:59	17	Q. (BY MR. WALKER) And with regard to the
13:33:18	18	flow through the ducts on the floor were at times so	13:36:03	18	poorly commissioned -- well, let me back up. Is the
13:33:22	19	loud it disrupted normal conversation.	13:36:07	19	leaking water feature -- have the problems with that
13:33:24	20	Q. Anything else?	13:36:09	20	been resolved, as far as you know?
13:33:26	21	A. There's -- like I said, I think it's either	13:36:09	21	MR. TROUT: Object to the form.
13:33:33	22	in the Knothe affidavit or possibly in her testimony	13:36:12	22	THE WITNESS: No. I believe they have not been
13:33:37	23	firsthand accounts of other problems that have been	13:36:12	23	resolved.
13:33:38	24	experienced and observed.	13:36:14	24	Q. (BY MR. WALKER) What about the leaking
13:33:40	25	Q. Is there anything else that you can recall	13:36:17	25	roof, have those problems been resolved?
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation, )  
) Case No. CV OC 0907257  
)  
Plaintiff/Counterdefendant, )  
)  
vs. )  
)  
PETRA INCORPORATED, an Idaho )  
corporation, )  
)  
Defendant/Counterclaimant. )  
\_\_\_\_\_ )

AUDIO-VISUAL DEPOSITION OF TODD WELTNER  
August 18, 2010  
Boise, Idaho

Janet French, CSR #946, RPR

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By: Mr. Walker	6

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266. Affidavit of Todd Weltner dated May 24, 2010 Filed in Support of Opposition to Motion for Summary Judgment (87 pages)	42
267. Second Affidavit of Todd Weltner Dated July 6, 2010 Filed in Support of Opposition To Motion for Summary Judgment (44 pages)	56
269. Five DVD's: City Hall Photos; Volume: Todd Files-multi-page PDFs; ASI/RFI/CM Volumes; Files for Bill; Meridian City Hall video files	35
270. Schedules and lists of ASI's and RFI's (124 pages)	35
271. Series of schematics and floor plans (13 pages)	35

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AUDIO-VISUAL DEPOSITION OF TODD WELTNER

BE IT REMEMBERED that the deposition of  
TODD WELTNER was taken by the Defendant/  
Counterclaimant at the offices of Cosho Humphrey, LLP,  
located at 800 Park Boulevard, Suite 790, Boise,  
Idaho, before Associated Reporting, Inc., by Janet  
French, a Court Reporter and Notary Public in and for  
the County of Ada, State of Idaho, on Wednesday, the  
18th day of August, 2010, commencing at the hour of  
8:33 a.m. in the above-entitled matter.

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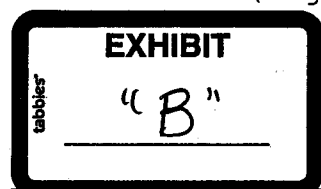
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272. Meridian City Hall, Vol I, Technical Specifications (9 pages)	35
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1 (Pages 1 to 4)

Associated Reporting Inc.  
208.343.4004



006194

08:57:46 1 repairs that needed to be done that day and, again,  
 08:57:47 2 the parapet was the big one so...  
 08:57:50 3 Q. And what did you take away from those  
 08:57:53 4 conversations regarding their previous work?  
 08:57:55 5 A. A little surprised to see a leak between the  
 08:57:57 6 patch and the original membrane, to be honest.  
 08:57:59 7 Q. They were surprised?  
 08:58:01 8 A. They were surprised. We were surprised,  
 08:58:05 9 yes. We were all baffled by the parapet cap situation  
 08:58:10 10 so -- but they did -- they did jump on the repairs  
 08:58:14 11 that day that we could identify so -- I mean, they  
 08:58:18 12 were very cooperative in trying to make it right.  
 08:58:21 13 Q. Ray Wetherholt was the roofing consultant?  
 08:58:22 14 A. Correct.  
 08:58:25 15 Q. Was he there at the site visit on the 23rd?  
 08:58:26 16 A. Yes.  
 08:58:27 17 Q. And what was the substance of any  
 08:58:31 18 conversations that Mr. Wetherholt held with the  
 08:58:34 19 participants that were inspecting the roof?  
 08:58:37 20 A. He was just there to give his advice and his  
 08:58:40 21 opinion, and so I don't think that Western Roofing did  
 08:58:43 22 anything that they didn't want to do. We didn't force  
 08:58:46 23 them to do anything. We just pointed out that there  
 08:58:50 24 was some problems as we saw them and Western took it  
 08:58:51 25 upon themselves to fix what they could.

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09:00:09 1 What was it that baffled everybody on that  
 09:00:11 2 site visit with respect to the parapet?  
 09:00:17 3 A. Well, it appeared that whatever -- whatever  
 09:00:21 4 took place for the membrane to be cut immediately  
 09:00:25 5 below or underneath the parapet cap, happened after  
 09:00:27 6 the membrane was installed.  
 09:00:33 7 It -- we assumed that Western was the roof  
 09:00:38 8 installer and the warranty installer for Versico and  
 09:00:40 9 that they did the patch. They didn't have any  
 09:00:44 10 recollection of that patch being made, and to our  
 09:00:46 11 knowledge, there was no other roofers on site at any  
 09:00:51 12 time, even after -- even after the building was  
 09:00:52 13 occupied.  
 09:00:55 14 So they couldn't -- they didn't know what --  
 09:00:58 15 in their own company, when it was done or why it was  
 09:01:02 16 done. We sure didn't know why it was done. Still  
 09:01:03 17 don't know.  
 09:01:05 18 Q. Now, you said something was patched. Was it  
 09:01:09 19 this cut that you identified what was patched?  
 09:01:10 20 A. Yeah. Right around the bottom of the  
 09:01:14 21 parapet, there was a slice in the membrane, literally  
 09:01:16 22 just a slice down, and then there was a patch over  
 09:01:19 23 that slice. And the bottom of that patch was actually  
 09:01:22 24 glued to the existing membrane -- the original  
 09:01:28 25 membrane, but the top in some places was not. So if

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08:58:55 1 Q. What specific problems did Mr. Wetherholt  
 08:58:56 2 provide information on?  
 08:58:59 3 A. Again, we -- you know, we looked at -- we  
 08:59:03 4 had a tomography report, and so we were looking at  
 08:59:07 5 those areas that were identified in that report, and  
 08:59:11 6 that's probably 15 or 20 specific areas that we got on  
 08:59:14 7 our hands and knees and looked around for leaks or --  
 08:59:17 8 and even pulled up the membrane to see if there was  
 08:59:22 9 any moisture beneath the membrane and the insulation  
 08:59:23 10 layer or any damage to the structure, which there  
 08:59:23 11 wasn't.  
 08:59:27 12 Q. Who prepared the tomography report?  
 08:59:30 13 A. Idaho Airships, I believe.  
 08:59:34 14 Q. And what were the results of your crawling  
 08:59:37 15 around on your hands and knees and pulling up the  
 08:59:37 16 membrane?  
 08:59:41 17 A. Well, we did find a couple leaks. I  
 08:59:45 18 wouldn't say a lot, but we found several -- several  
 08:59:48 19 areas of concern including a slashed area of a  
 08:59:51 20 membrane, which we couldn't figure out how it  
 08:59:53 21 happened. But we did find, you know, a dozen areas  
 08:59:56 22 that they repaired that day.  
 08:59:59 23 Q. Okay. You mentioned the parapet that you  
 09:00:03 24 were baffled -- everyone, apparently, was baffled by  
 09:00:05 25 the -- whatever you observed regarding the parapet.

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09:01:30 1 that top membrane came out underneath -- beyond the  
 09:01:33 2 cap of the parapet, that would catch water, and that's  
 09:01:35 3 what was -- we assume was happening.  
 09:01:39 4 Q. And was any determination made of when the  
 09:01:40 5 cut was -- when the cut occurred?  
 09:01:41 6 A. No.  
 09:01:45 7 Q. How long was the cut?  
 09:01:50 8 A. Well, we found it in half a dozen spots, and  
 09:01:56 9 it varied from 10 feet to 40 or 50 feet, so quite  
 09:01:56 10 extensive.  
 09:01:59 11 Q. And was it apparent that it was a cut, or  
 09:02:01 12 was the material short?  
 09:02:03 13 A. No. We determined it was a cut. The  
 09:02:07 14 membrane actually went up and over the top of the  
 09:02:10 15 parapet wall, which it was supposed to for the detail,  
 09:02:13 16 so it had been cut at somebody's direction or  
 09:02:16 17 somebody's -- we don't know what.  
 09:02:20 18 Q. I noted -- and we'll get to your affidavit  
 09:02:24 19 and the exhibits attached, but I believe there was a  
 09:02:25 20 photograph of where this --  
 09:02:25 21 A. Yes.  
 09:02:29 22 Q. And that's representative of what you've  
 09:02:31 23 been talking about?  
 09:02:32 24 A. Yes.  
 09:02:38 25 Q. Okay. We were talking about who you

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8 (Pages 29 to 32)

10:40:26	1	the third floor felt it under their feet, and the	10:42:40	1	A. The drains were literally reversed
10:40:26	2	people down below heard it up in the ceiling.	10:42:44	2	backwards. The over flow from the main drain.
10:40:29	3	Q. You consider this to be a life safety issue?	10:42:46	3	Q. Did you look at the plans to determine what
10:40:30	4	A. I don't, actually.	10:42:47	4	the plans specified?
10:40:31	5	Q. Why not?	10:42:48	5	A. Yes, we did.
10:40:34	6	A. I don't think that one weld breaking is	10:42:50	6	Q. And that's how you determined that they were
10:40:41	7	probably a life safety issue.	10:42:52	7	reversed?
10:40:43	8	Q. And what other causes did you consider in	10:42:55	8	A. We actually stuck a hose in the drain to see
10:40:47	9	the process of eliminating causes for the popping	10:43:00	9	where it drained out, Eric Jensen did. And as he put
10:40:47	10	sound?	10:43:03	10	the hose in the over flow drain, it came out -- or
10:40:51	11	A. I mean, we kind of talked about maybe a	10:43:05	11	excuse me -- in the main drain, it came out at that
10:40:56	12	mechanical noise pinging or something like that. That	10:43:09	12	location that is intended only for over flow, which
10:40:58	13	didn't seem to be consistent with what they were	10:43:12	13	would be a minimal amount of water if ever.
10:41:01	14	describing. It felt like a violent -- a violent	10:43:16	14	Q. And when did that problem first manifest
10:41:02	15	occurrence.	10:43:16	15	itself?
10:41:03	16	Q. How violent?	10:43:17	16	A. I don't know the exact date.
10:41:05	17	A. I mean, just -- again, they could feel it in	10:43:21	17	Q. How much prior to June 4th were you informed
10:41:07	18	their feet on the third floor, so enough that you	10:43:26	18	that the over flow issue manifested itself?
10:41:09	19	could feel it in the building structure.	10:43:28	19	A. We were informed a week or two before, but
10:41:14	20	Q. When did this popping noise first manifest	10:43:33	20	it had been occurring all spring during the rainy
10:41:15	21	itself?	10:43:33	21	season.
10:41:17	22	A. I don't know the exact date, but the site	10:43:37	22	Q. And whose responsibility would it be for the
10:41:21	23	visit was March 26, so sometime around that time	10:43:41	23	installation of the drains and the over flow?
10:41:22	24	frame.	10:43:42	24	MR. TROUT: Object to the form.
10:41:29	25	Q. Was the popping noise contemporaneous with	10:43:45	25	THE WITNESS: I mean, I don't know on this
Page 101			Page 103		
10:41:32	1	your visit on March 26, 2010?	10:43:45	1	specific project.
10:41:33	2	A. Yes. That was the reason for that visit.	10:43:47	2	Q. (BY MR. WALKER) Would it be Buss
10:41:37	3	Q. And how much before March 26, 2010, did the	10:43:49	3	Mechanical?
10:41:41	4	popping noise occur before you showed up on the scene?	10:43:50	4	MR. TROUT: Same objection.
10:41:42	5	A. A week or two.	10:43:53	5	THE WITNESS: I don't know for sure if that's in
10:41:45	6	Q. A week or two before that date?	10:43:54	6	their scope or not.
10:41:45	7	A. Correct.	10:43:57	7	Q. (BY MR. WALKER) And in your experience as a
10:41:48	8	Q. Do you know whether or not anyone attempted	10:43:59	8	general contractor, does the City plumbing inspector
10:41:51	9	to tape record the popping noise?	10:44:02	9	inspect drains?
10:41:55	10	A. No. It was in the middle of the day, so no	10:44:03	10	MR. TROUT: Object to the form.
10:41:56	11	tape recorders going.	10:44:05	11	THE WITNESS: They look at the drains. I don't
10:41:59	12	Q. Okay. Now, we've talked about the steel,	10:44:07	12	know that they would do a water test.
10:42:02	13	the clean outs, and the parapet issue.	10:44:08	13	Q. (BY MR. WALKER) Do you know whether or not
10:42:07	14	What other parts of the project did you	10:44:13	14	the City inspector ever red tagged the drains?
10:42:10	15	determine were defective and deficient and not	10:44:14	15	MR. TROUT: Object to the form.
10:42:12	16	performed in accordance with plans and specifications?	10:44:15	16	THE WITNESS: No, I do not.
10:42:16	17	A. Again, can you re-read the list that we had	10:44:18	17	Q. (BY MR. WALKER) The next item on your list
10:42:16	18	earlier?	10:44:21	18	was June 28, the roof membrane. We've talked about
10:42:19	19	Q. Sure. You have the roof over flow issue on	10:44:23	19	the cut and not sealed?
10:42:20	20	June 4th.	10:44:23	20	A. Right.
10:42:22	21	A. Okay. That's a defective issue.	10:44:26	21	Q. And I think your testimony was is that it
10:42:27	22	Q. And when did -- and how is that a -- how do	10:44:30	22	appeared, at least based on your investigation, that
10:42:31	23	you know from your observation that the roof over flow	10:44:33	23	the roof membrane was installed in accordance with the
10:42:34	24	issue was not created by work performed in accordance	10:44:34	24	plans and specifications.
10:42:37	25	with the plans and specifications?	10:44:36	25	Do I recall your testimony correctly?
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11:41:55	1	to testify as to the proper fix for this particular	11:44:17	1	Q. Yes. Thank you.
11:41:56	2	problem?	11:44:20	2	A. If I can put my fingers on it again. So,
11:41:58	3	A. I would suggest that the lentel be extended,	11:44:25	3	again, this was a -- we were on the roof looking at
11:42:01	4	but that's really an architect and engineer call.	11:44:28	4	the parapet cap and came across this -- or excuse
11:42:03	5	Q. Okay. And in your experience as a general	11:44:31	5	me -- the parapet wall, in this case, with the
11:42:06	6	contractor, how would the lentel be extended?	11:44:34	6	masonry, and came across this condition with the
11:42:09	7	A. After the fact, the brick would have to be	11:44:36	7	parapet cap and the membrane.
11:42:14	8	taken off so they can get back to the structural steel	11:44:38	8	Q. Okay. And what's the number on it?
11:42:15	9	in order to do that.	11:44:40	9	A. CM111464.
11:42:16	10	Q. And is that possible?	11:44:42	10	Q. Okay. Thank you. Are those photographs
11:42:16	11	A. Absolutely.	11:44:45	11	that you are removing them from are our official
11:42:29	12	Q. Now, in paragraph 9, you refer to this	11:44:47	12	exhibit book or from your book?
11:42:32	13	problem that we've just been discussing with respect	11:44:49	13	A. This is our book.
11:42:36	14	to the missing lentel as a latent defect.	11:44:51	14	Q. I've seen those photographs, so you can put
11:42:40	15	Why would you refer to it as a latent	11:44:51	15	them back.
11:42:40	16	defect?	11:44:56	16	A. So, again, on this specific situation,
11:42:46	17	A. Again, it's -- maybe "latent" was wrong, but	11:45:00	17	obviously, this membrane was hanging out from the
11:42:47	18	it's definitely a defect in the construction,	11:45:01	18	parapet cap.
11:42:50	19	obviously, with the failure, so it was pretty obvious	11:45:01	19	Q. Would you mind holding it over by the camera
11:42:53	20	that something was amiss in that location.	11:45:03	20	within the frame.
11:42:56	21	Q. Why did you use the words "latent defect"	11:45:05	21	A. Sorry. So this is where the water was
11:42:58	22	when describing this?	11:45:08	22	pouring into -- behind the roofing membrane.
11:42:58	23	A. I don't recall.	11:45:11	23	And if you can see, this is actually a patch
11:43:02	24	Q. Who took the photographs?	11:45:15	24	right along this area here, because the cut is right
11:43:04	25	A. Bill Selvage took those photographs.	11:45:17	25	below this parapet cap (indicating).
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11:43:09	1	Q. Did you discuss the remedy that you've just	11:45:17	1	Q. Okay.
11:43:12	2	testified to with Mr. Selvage?	11:45:18	2	A. Okay?
11:43:13	3	A. No, not that I recall.	11:45:19	3	Q. Thank you.
11:43:16	4	Q. Would this be warranty work to be performed	11:45:23	4	A. Again, this kind of -- the pattern -- so we
11:43:23	5	by the steel structure -- the steel erector?	11:45:27	5	go up to look at this, and we find this, so it kind of
11:43:24	6	MR. TROUT: Object to the form.	11:45:29	6	lends to the pattern of defects, if you will.
11:43:25	7	THE WITNESS: I don't know.	11:45:33	7	Q. Okay. But you don't -- with respect to the
11:43:26	8	Q. (BY MR. WALKER) Do you know whether or not	11:45:37	8	pattern of defects and, specifically, the cut in the
11:43:31	9	the City has made a claim -- a warranty claim with	11:45:41	9	membrane, you don't know when that occurred?
11:43:34	10	respect to the missing lentel?	11:45:45	10	A. I do not know when that occurred, just that
11:43:34	11	MR. TROUT: Object to the form.	11:45:45	11	it's leaking.
11:43:36	12	THE WITNESS: I'm not aware.	11:45:51	12	Q. As part of your discussion with respect to
11:43:43	13	Q. (BY MR. WALKER) Now, in paragraph 10 --	11:45:54	13	the problem with the membrane, did you discuss the
11:43:46	14	take a moment just to review paragraph 10, because I	11:45:56	14	possibility of sabotage?
11:43:49	15	think we've thoroughly discussed that issue, but if	11:45:58	15	MR. TROUT: Object to the form.
11:43:53	16	there is anything you need to add, I'd like you to	11:45:59	16	THE WITNESS: No.
11:43:55	17	add -- and we are speaking about the roofing membrane	11:45:59	17	MR. WALKER: Okay.
11:43:59	18	material that was supposed to go up the inside of the	11:46:18	18	Q. (BY MR. WALKER) Now, on paragraph 11, with
11:44:03	19	parapet wall, rap over the top, and return down the	11:46:21	19	respect to this issue of the membrane, you say, "I
11:44:03	20	outside to complete the --	11:46:24	20	performed on-site inspection, and I observed the
11:44:07	21	A. Right. And I came across a picture looking	11:46:27	21	roofing membrane on the inside of the parapet wall was
11:44:09	22	for those --	11:46:31	22	not lapped over the top of the parapet wall and has
11:44:09	23	Q. Okay.	11:46:34	23	pulled away from the underlying structure."
11:44:12	24	A. -- that really summarizes the issue, so I	11:46:35	24	Did I read that correctly?
11:44:15	25	think that might be helpful.	11:46:37	25	A. Yes. And actually, that's incorrect,
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11:46:42 1 because on our subsequent visit to the job site on the  
 11:46:46 2 23rd of July we did find that it appeared it did lap  
 11:46:48 3 up over the top.  
 11:46:59 4 Q. Okay. Thank you. In paragraph 12, you  
 11:47:02 5 testify, "I have studied the project specifications  
 11:47:05 6 for the exterior cast stone installed. The  
 11:47:10 7 specifications called for not more than 1/16th inch  
 11:47:14 8 tolerance maximum from each adjacent unit of the  
 11:47:17 9 exterior stone work. It also specifies that there  
 11:47:19 10 shall be no more than 1/8th variance in the mortar  
 11:47:25 11 joints, which is to be consistently 3/8th of an inch."  
 11:47:27 12 Did I read that correctly?  
 11:47:28 13 A. Correct.  
 11:47:33 14 Q. Did you note whether or not this defect that  
 11:47:36 15 you've identified in paragraph 12 appeared on any  
 11:47:38 16 punch list?  
 11:47:39 17 MR. TROUT: Object to the form.  
 11:47:42 18 THE WITNESS: Again, not without having seen all  
 11:47:48 19 the punch lists possible, I don't note that ever  
 11:47:49 20 showed up on any.  
 11:47:50 21 Q. (BY MR. WALKER) Do you know when this  
 11:47:52 22 defect -- or do you know when this alleged defect was  
 11:47:54 23 first discovered?  
 11:47:54 24 A. No.  
 11:47:57 25 Q. When did you conduct your review of the

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11:47:58 1 masonry?  
 11:48:00 2 A. Uhm, you have the date there.  
 11:48:04 3 Q. I didn't. I have -- I don't have a masonry  
 11:48:07 4 entry for the eight that you've specified.  
 11:48:12 5 A. Uhm, it was -- again, it was -- it was in  
 11:48:16 6 July, so one of those site visits we incorporated the  
 11:48:17 7 masonry as well.  
 11:48:19 8 Q. Okay. Was it -- on the 23rd, you were  
 11:48:19 9 basically on the roof.  
 11:48:21 10 A. That's the roof, right, so probably --  
 11:48:23 11 Q. So it would be the 13th? Would that be  
 11:48:24 12 reasonable?  
 11:48:24 13 A. Yes.  
 11:48:29 14 Q. Thank you. That's July 13th, 2010; correct?  
 11:48:30 15 A. Right.  
 11:48:33 16 Q. Do you know whether or not the contractor  
 11:48:39 17 who laid up the stone has been notified about this  
 11:48:40 18 problem?  
 11:48:43 19 A. My understanding is that Laura has been in  
 11:48:46 20 contact with the contractor that installed that.  
 11:48:47 21 Q. Do you know who the contractor is?  
 11:48:49 22 A. TMC Masonry.  
 11:48:54 23 Q. And you mentioned that you talked to Tim  
 11:48:57 24 McGourty, but you didn't have any specific discussions  
 11:48:58 25 about this issue?

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11:48:58 1 A. No.  
 11:49:01 2 Q. Why didn't you ask him about this particular  
 11:49:01 3 issue?  
 11:49:02 4 A. It wasn't appropriate.  
 11:49:04 5 Q. And why do you say that?  
 11:49:06 6 A. I just -- the legal proceedings, I didn't  
 11:49:08 7 think we should be talking about this.  
 11:49:12 8 Q. Did anyone tell you not to talk to  
 11:49:13 9 Mr. McGourty?  
 11:49:15 10 A. No. It's pretty common sense.  
 11:49:21 11 Q. Okay. Now, once again, you've characterized  
 11:49:27 12 this, I believe, as a "latent defect."  
 11:49:32 13 A. Yeah, and that -- again, it's a defect. It  
 11:49:34 14 obviously does not follow specifications. The joints  
 11:49:39 15 are larger than they are supposed. The difference  
 11:49:42 16 between the stones is larger than it is supposed to  
 11:49:46 17 be. And we have some really good photos, again, that  
 11:49:47 18 show that.  
 11:49:48 19 Q. Are you aware of the industry standards for  
 11:49:51 20 masonry construction?  
 11:49:52 21 MR. TROUT: Object to the form.  
 11:49:56 22 THE WITNESS: Again, I'm not a masonry expert  
 11:49:56 23 so...  
 11:49:58 24 I know they have their standards, but I'm  
 11:49:58 25 not an expert.

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11:50:00 1 Q. (BY MR. WALKER) Based on your experience as  
 11:50:05 2 a general contractor, do you consider the masonry work  
 11:50:06 3 to be defective?  
 11:50:07 4 MR. TROUT: Object to the form.  
 11:50:10 5 THE WITNESS: I would say it does not follow  
 11:50:11 6 specifications.  
 11:50:14 7 Q. (BY MR. WALKER) In your mind, does that  
 11:50:15 8 mean it's defective?  
 11:50:17 9 MR. TROUT: Object to the form to the extent it  
 11:50:18 10 calls for a legal conclusion.  
 11:50:21 11 THE WITNESS: I would say that that's not my  
 11:50:22 12 determination.  
 11:50:30 13 Q. (BY MR. WALKER) Now, you go on in paragraph  
 11:50:35 14 15. It says, "Without further analysis in discovery,  
 11:50:38 15 I will" -- oh -- "with further analysis in discovery,  
 11:50:42 16 I will be able to obtain actual bids for the repairs  
 11:50:46 17 necessary for the defects noted above."  
 11:50:48 18 Are you referring only to the masonry work?  
 11:50:48 19 A. Correct. Yes.  
 11:50:52 20 Q. "But based upon any education, training, and  
 11:50:56 21 experience, I would conservatively estimate the cost  
 11:50:58 22 of repairs/replacement to be in excess of \$1 million."  
 11:51:01 23 What portion of your education would provide  
 11:51:05 24 you with the background necessary to make an  
 11:51:08 25 estimate -- a conservative estimate of the cost of

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho)

Municipal Corporation, )

) Case No. CV OC 0907257

)

Plaintiff/Counterdefendant, )

)

vs. )

)

PETRA INCORPORATED, an Idaho )

corporation, )

)

Defendant/Counterclaimant. )

AUDIO-VIDEO DEPOSITION OF LAURA KNOTHE

August 11, 2010

Boise, Idaho

Janet French, CSR #946, RPR

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AUDIO-VIDEO DEPOSITION OF LAURA KNOTHE

BE IT REMEMBERED that the deposition of  
LAURA KNOTHE was taken by the Defendant/  
Counterclaimant at the offices of Cosho Humphrey, LLP,  
located at 800 Park Boulevard, Suite 790, Boise,  
Idaho, before Associated Reporting, Inc., by Janet  
French, a Court Reporter and Notary Public in and for  
the County of Ada, State of Idaho, on Wednesday, the  
11th day of August, 2010, commencing at the hour of  
9:01 a.m. in the above-entitled matter.

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09:01:26 9  
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09:01:35 13  
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09:02:10 21  
09:02:12 22  
09:02:15 23  
09:02:17 24  
09:02:20 25

PROCEEDINGS

MR. WALKER: On the record. I need to do a few  
things here to comply with the Idaho Rule of Civil  
Procedure 30(b)(4), and so I'll just recite this  
little script.

This is the deposition of Laura Knothe which  
is being taken on behalf of the defendant, Petra  
Incorporated, in Case No. CV OC 09-7257 filed by the  
City of Meridian in the District Court of the Fourth  
Judicial District for the State of Idaho in and for  
Ada County.

This deposition is being taken on August 11,  
2010, commencing at 9:00 a.m. Mountain Time before  
Janet French a court reporter with Associated  
Reporting, Inc., whose address is 1618 West Jefferson,  
Boise, Idaho 83702. The deposition is being conducted  
at the offices of Cosho Humphrey, LLP, at 800 Park  
Boulevard, Suite 790, Boise, Idaho 83712.

I'm Thomas G. Walker of the Cosho Humphrey  
firm, and I'm here representing Petra Incorporated,  
the defendant, in this lawsuit, and I'm also the  
operator of the audio-visual equipment.

This deposition is being taken in accordance  
with the Idaho Rules of Civil Procedure, and there are

Page 4

1 (Pages 1 to 4)

Associated Reporting Inc.  
208.343.4004

EXHIBIT

"C"

006199

13:20:25 1 A. The -- the unit was labeled.  
 13:20:30 2 Q. And who hooked the pipes up backwards, which  
 13:20:31 3 entity?  
 13:20:32 4 A. Buss Mechanical.  
 13:20:36 5 Q. So how does that involve Hobson?  
 13:20:47 6 A. I believe Buss -- well, it was Hobson's air  
 13:20:50 7 handling unit, and it was labeled incorrectly.  
 13:20:52 8 Q. By the manufacturer?  
 13:20:53 9 A. Yes.  
 13:20:58 10 Q. How would Petra as the construction manager  
 13:21:02 11 determine that the pipes were mislabeled?  
 13:21:05 12 A. They may determine that the air handling  
 13:21:10 13 unit wasn't functioning properly and that there was no  
 13:21:11 14 heating across the coils.  
 13:21:13 15 Q. Do you know whether or not there was heating  
 13:21:15 16 across the coils at the time the building was  
 13:21:17 17 occupied?  
 13:21:18 18 A. There couldn't have been.  
 13:21:20 19 Q. How do you know that?  
 13:21:22 20 A. The water wasn't going across the coils  
 13:21:24 21 because the piping was backwards.  
 13:21:27 22 Q. And has that problem been resolved?  
 13:21:28 23 A. It has.  
 13:21:29 24 MR. TROUT: Object to the form.  
 13:21:31 25 Q. (BY MR. WALKER) It has; correct?

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13:23:02 1 controls?  
 13:23:03 2 A. Hobson.  
 13:23:06 3 Q. And when you say the problem has been  
 13:23:11 4 mitigated, what do you mean by that?  
 13:23:13 5 A. Adjustments have been made. Some of the  
 13:23:19 6 control set points have been adjusted to improve the  
 13:23:21 7 comfort level.  
 13:23:26 8 Q. And has that -- is that resolution  
 13:23:28 9 satisfactory?  
 13:23:29 10 MR. TROUT: Object to the form.  
 13:23:31 11 Q. (BY MR. WALKER) Do you know whether that  
 13:23:33 12 resolution is satisfactory?  
 13:23:38 13 MR. TROUT: Same objection.  
 13:23:40 14 THE WITNESS: I believe it's much better.  
 13:23:46 15 Q. (BY MR. WALKER) Well, is it satisfactory?  
 13:23:54 16 MR. TROUT: Same objection.  
 13:23:55 17 THE WITNESS: I believe so.  
 13:23:57 18 Q. (BY MR. WALKER) With regard to Buss  
 13:24:04 19 Mechanical, which -- specifically, what items were not  
 13:24:12 20 properly completed by Buss Mechanical?  
 13:24:15 21 A. The glycol loop chemicals that we talked  
 13:24:15 22 about earlier.  
 13:24:19 23 Q. Okay. Anything else?  
 13:24:27 24 A. The piping of the air handling, which we  
 13:24:31 25 just -- the air handlers, which we just talked about,

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13:21:31 1 A. Yes.  
 13:21:38 2 Q. And when was it resolved?  
 13:21:43 3 A. December '09 or January '10.  
 13:21:47 4 Q. And when was the problem first discovered?  
 13:21:48 5 A. December of '09.  
 13:21:52 6 Q. So the problem never arose until more than a  
 13:21:55 7 year after the date of occupancy; is that your  
 13:21:56 8 testimony?  
 13:21:57 9 MR. TROUT: Object to the form.  
 13:21:59 10 THE WITNESS: The problem existed. The  
 13:22:02 11 troubleshooting effort revealed it.  
 13:22:04 12 Q. (BY MR. WALKER) When did the problem with  
 13:22:09 13 the mislabeled pipes -- when was it first discovered?  
 13:22:12 14 A. About a -- I think I just answered that,  
 13:22:17 15 December of '10 -- I mean '09.  
 13:22:21 16 Q. Okay. Back to Hobson, because we kind of  
 13:22:24 17 jumped over to Buss Mechanical.  
 13:22:27 18 Are there any open items with respect to  
 13:22:30 19 what you've alleged is work not properly completed by  
 13:22:34 20 Hobson as of today?  
 13:22:40 21 A. Not that I can recall. The only caveat  
 13:22:46 22 would be there is still some tweaking necessary with  
 13:22:54 23 the HVAC controls. I believe the problems have been  
 13:22:56 24 mitigated.  
 13:23:01 25 Q. Which entity is responsible for the

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13:24:40 1 which was really more Hobson's responsibility.  
 13:24:43 2 At this point, I can't remember any other  
 13:24:43 3 items.  
 13:24:48 4 Q. Okay. What about M.R. Miller?  
 13:24:51 5 Specifically, what items of work was not properly  
 13:24:54 6 completed by M.R. Miller?  
 13:24:59 7 A. The water feature -- it is my understanding  
 13:25:03 8 that the water feature has never functioned properly  
 13:25:05 9 in that it has always leaked.  
 13:25:10 10 Q. And what was M.R. Miller's involvement in  
 13:25:11 11 the water feature?  
 13:25:12 12 MR. TROUT: Object to the form.  
 13:25:14 13 You can answer.  
 13:25:17 14 Q. (BY MR. WALKER) Do you know what M.R.  
 13:25:21 15 Miller's responsibilities were with respect to the  
 13:25:22 16 water feature?  
 13:25:24 17 MR. TROUT: Same objection.  
 13:25:26 18 THE WITNESS: To install the -- the question --  
 13:25:31 19 the question that we are working with them on is the  
 13:25:34 20 installation of the piping and the basins for the  
 13:25:35 21 water feature.  
 13:25:38 22 Q. (BY MR. WALKER) And what had been -- what  
 13:25:40 23 has been the result of your working with M.R. Miller  
 13:25:44 24 with respect to those issues?  
 13:25:48 25 A. The leak has been slowed. I mean, the

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41 (Pages 161 to 164)

13:25:53 1 quantity of the leak has decreased considerably.  
 13:25:56 2 There is still an existing leak --  
 13:25:58 3 Q. And when --  
 13:25:59 4 A. -- or several.  
 13:26:03 5 Q. And when did the leaks, plural, first  
 13:26:06 6 manifest themselves?  
 13:26:13 7 A. My understanding is summer of -- I guess I  
 13:26:14 8 don't know for sure.  
 13:26:18 9 Q. Okay. And you indicated, I believe, that  
 13:26:22 10 there is continuing effort -- there is a continuing  
 13:26:25 11 effort with M.R. Miller to resolve the continuing  
 13:26:26 12 leaks?  
 13:26:26 13 A. Yes.  
 13:26:32 14 Q. Do you know what the volume of water is  
 13:26:33 15 leaking?  
 13:26:36 16 A. It's -- at this point in time, I believe it  
 13:26:42 17 is about 2,000 gallons a day.  
 13:26:46 18 Q. And how was that determination made?  
 13:26:48 19 A. Through a test by the City.  
 13:26:51 20 Q. And who conducted those tests?  
 13:26:52 21 A. Elroy Huff.  
 13:26:56 22 Q. And how did he conduct the tests?  
 13:27:01 23 A. By just running one run of piping at a time  
 13:27:05 24 and -- and then the water feature is on its own meter,  
 13:27:09 25 so in running one water feature at a time and

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13:28:46 1 have -- I haven't gotten into that.  
 13:28:50 2 Q. Okay. As you sit here today, what is the  
 13:28:56 3 status of any work that was not properly completed by  
 13:28:57 4 Western Roofing?  
 13:29:00 5 A. I haven't worked on the roof --  
 13:29:03 6 Q. So you don't know --  
 13:29:09 7 A. -- per se, for the last -- I don't know the  
 13:29:12 8 status. I believe they haven't had a leak in some  
 13:29:12 9 time.  
 13:29:15 10 Q. Approximately how long has it been since the  
 13:29:17 11 roof last leaked, do you know?  
 13:29:20 12 A. I don't know. There are hundreds of patches  
 13:29:22 13 on the roof is what I know.  
 13:29:25 14 Q. What's the status of the warranty -- are you  
 13:29:28 15 aware of what the status of the warranty is on the  
 13:29:30 16 roof as we sit here today?  
 13:29:31 17 MR. TROUT: Object to the form.  
 13:29:41 18 THE WITNESS: I am not. In December or January  
 13:29:46 19 when I was working on the roof, I believe they --  
 13:29:55 20 Western had repaired -- basically, addressed the items  
 13:30:04 21 that were on the Versico warranty list, but there were  
 13:30:08 22 subsequent leaks, so I'm not sure at this point.  
 13:30:12 23 Q. (BY MR. WALKER) Are you aware of whether or  
 13:30:17 24 not Western Roofing and/or Versico extended the  
 13:30:19 25 warranty to the City to the lease -- and by extended,

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13:27:14 1 determining the usage of water that's leaving the  
 13:27:14 2 system.  
 13:27:17 3 Q. And where is the water going?  
 13:27:20 4 A. We are not exactly sure.  
 13:27:22 5 Q. Do you have -- based on your conversations  
 13:27:28 6 with Elroy Huff or anyone else, do you have any idea  
 13:27:31 7 of where the water is going?  
 13:27:36 8 A. I believe the most significant source of the  
 13:27:41 9 leak is actually the basins themselves.  
 13:27:45 10 Q. And where is the water going that's leaking  
 13:27:48 11 out of the basins?  
 13:27:50 12 A. Into the sub grade of the plaza.  
 13:28:04 13 Q. With regard to Western Roofing, what  
 13:28:14 14 specific items of work were not properly completed by  
 13:28:16 15 Western Roofing?  
 13:28:17 16 A. There was several leaks in the roofing  
 13:28:18 17 system.  
 13:28:21 18 Q. And was that the fault -- have you  
 13:28:23 19 determined whether or not that was the fault of  
 13:28:25 20 Western Roofing?  
 13:28:26 21 A. I believe some were.  
 13:28:29 22 Q. And what about the others?  
 13:28:31 23 A. It's possible that the roof could have been  
 13:28:37 24 damaged by other contractors. They have a  
 13:28:41 25 responsibility to protect their installation, but I

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13:30:22 1 I mean, increase the warranty period?  
 13:30:23 2 MR. TROUT: Object to the form.  
 13:30:28 3 THE WITNESS: I'm not aware. It's a two-year  
 13:30:28 4 warranty.  
 13:30:31 5 MR. TROUT: Counsel, I'm going to ask that we go  
 13:30:34 6 off the record for a period of time. I need to  
 13:30:38 7 prepare, as I told you earlier, for a 2:00 o'clock  
 13:30:42 8 conference call with the Court in conjunction with the  
 13:30:44 9 one that was taken this morning.  
 13:30:46 10 MR. WALKER: Okay. Let's go off the record.  
 13:30:46 11 (Off the record.)  
 13:31:48 12 MR. WALKER: Back on the record.  
 13:31:53 13 I had a discussion with Mr. Trout, the  
 13:31:56 14 City's counsel, regarding some other obligations that  
 13:31:59 15 he has this afternoon, and as a consequence of the  
 13:32:02 16 fact that we are going to have to continue this  
 13:32:05 17 deposition at a later time in order to cover the  
 13:32:07 18 documents that Ms. Knothe has provided us, we have  
 13:32:12 19 agreed to continue the deposition to some later date  
 13:32:15 20 that's convenient to Counsel and the parties.  
 13:32:17 21 Is that correct, Mr. Trout?  
 13:32:17 22 MR. TROUT: Yes, sir.  
 13:32:20 23 MR. WALKER: Thank you. We'll go off the record.  
 13:34:57 24 (The deposition adjourned at 1:32 p.m.)  
 13:34:57 25 (Signature requested.)

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006202

3. Attached hereto as Exhibit "A" is a true and correct copy of the Deposition Transcript of Jack K. Lemley taken on June 16, 2010. The relevant portions are as follows:

- a. Page 7:19-8:7;
- b. Page 14:3-16;
- c. Page 18:21 – 25;
- d. Page 77:11-21;
- e. Page 84:15-21; and
- f. 163:4-8;


4. Attached hereto as Exhibit "B" is a true and correct copy of the Deposition Transcript of Jack K. Lemley taken on July 22, 2010. The relevant portions are as follows:

- a. Page 195:13-24;
- b. Page 197:7-198:22;
- c. Page 199:12-200:21;
- d. Page 206:21-208:17;
- e. Page 213:17-216:1;
- f. Page 233:11-22;
- g. Page 244:23-245:8;
- h. Page 248:13-249:3;
- i. Page 252:20-254:5;
- j. Page 258:23-259:14;
- k. Page 267:22-268:12;
- l. Page 270:18-25;
- m. Page 272:4-19;

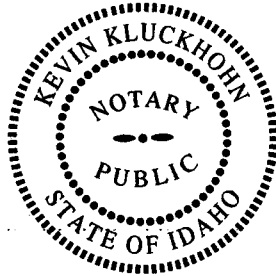
- n. Page 282:25-283:6;
- o. Page 286:2-12;
- p. Page 288:19-289:3; and
- q. Page 290:25-291:8.


FURTHER YOUR AFFIANT SAYETH NAUGHT.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
GOURLEY, PA

By:   
Kim J. Trout

Subscribed and sworn to before me this 13<sup>th</sup> day of September, 2010.




  
Notary Public, State of Idaho  
Residing at: Meridian, ID  
My commission expires: November 3, 2014

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13 day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P.O. Box 9518  
Boise, Idaho 83707-9518  
Direct Facsimile: (208) 639-5609

Hand Delivered ☐  
U.S. Mail ☐  
Fax ☒  
Email ☐

  
Kim J. Trout

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho)  
Municipal Corporation, )  
) Case No. CV OC 09-7257  
)  
Plaintiff, )  
)  
v. )  
)  
PETRA, INCORPORATED, an Idaho )  
Corporation, )  
)  
Defendant. )

DEPOSITION OF JACK K. LEMLEY  
June 16, 2010  
Boise, Idaho

Janet French, CSR #946, RPR

INDEX

EXAMINATION

JACK K. LEMLEY	PAGE
By: Mr. Trout	5

EXHIBITS

NO.		
85.	Notice of Deposition of Jack E. Lemley (4 pages)	6
86.	Vol. 1 - Exhibits to Affidavit to Eugene R. Bennett dated 4/7/10 in Support of Petra Incorporated's Opposition to Motion for Leave to Amend to File First Amended Complaint and Exhibits A-P (591 pages)	7
87.	Vol. 2 - Exhibits to Affidavit to Eugene R. Bennett dated 4/7/10 in Support of Petra Incorporated's Opposition to Motion for Leave to Amend to File First Amended Complaint and Exhibits Q-BB (470 pages)	7
88.	Document Package for Lemley International Expert Witness (288 pages)	7
89.	Construction Manager as Adviser (CMA) Contract Relationship Diagram (1 page)	37

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DEPOSITION OF JACK K. LEMLEY

BE IT REMEMBERED that the deposition of JACK K. LEMLEY was taken by the Plaintiff at the offices of Trout Jones Gledhill Fuhrman, P.A., located at 225 North 9th Street, Suite 820, Boise, Idaho, before Associated Reporting, Inc., by Janet French, a Court Reporter and Notary Public in and for the County of ada, State of Idaho, on Wednesday, the 16th day of June, 2010, commencing at the hour of 9:00 a.m. in the above-entitled matter.

APPEARANCES:

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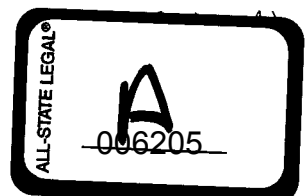
Also Present: Richard Kluckhohn

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EXHIBITS (Continued)

NO.		PAGE
90.	Construction Manager as Adviser (CMA) Contract Relationship Diagram (1 page)	38
91.	Jack Lemley's written statement of opinions dated 6/10/2010 (19 pages)	64
92.	Meridian City Hall Project Phase III T.I. and MEP's Bid Packages (22 pages)	139

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<p>1 PROCEEDINGS</p> <p>2</p> <p>3 JACK K. LEMLEY,</p> <p>4 a witness having been first duly sworn to tell the</p> <p>5 truth, the whole truth, and nothing but the truth,</p> <p>6 testified as follows:</p> <p>7</p> <p>09:02:08 8 EXAMINATION</p> <p>09:02:08 9 BY MR. TROUT:</p> <p>09:02:11 10 Q. Could you state your full name for the</p> <p>09:02:15 11 record and spell the last, please.</p> <p>09:02:20 12 A. Jack Kenneth Lemley, L-E-M-L-E-Y.</p> <p>09:02:24 13 Q. Mr. Lemley, my name is Kim Trout. This is</p> <p>09:02:27 14 the time set for your deposition pursuant to notice</p> <p>09:02:34 15 and a deposition duces tecum notice precisely.</p> <p>09:02:37 16 The first thing I would like to do is</p> <p>09:02:41 17 establish a couple of things, and I don't mean to pry</p> <p>09:02:45 18 in doing this, but I think it's somewhat important.</p> <p>09:02:48 19 What is your age, sir?</p> <p>09:02:48 20 A. Seventy-six.</p> <p>09:02:54 21 Q. And are you currently taking any kind of</p> <p>09:02:59 22 medication that would impair your ability to hear,</p> <p>09:03:03 23 understand, and respond to questions here today?</p> <p>09:03:03 24 A. No.</p> <p>09:03:07 25 Q. Is there anything about your physical health</p> <p>Page 5</p>	<p>09:04:41 1 Petra Incorporated or from Cosho Humphrey for this</p> <p>09:04:41 2 matter.</p> <p>09:04:43 3 Do you see that, sir?</p> <p>09:04:43 4 A. I do.</p> <p>09:04:46 5 Q. What have you brought with you in compliance</p> <p>09:04:48 6 with that request?</p> <p>09:04:50 7 A. Three binders that we received from the</p> <p>09:04:57 8 Cosho Humphrey firm, and we have not completed the</p> <p>09:05:03 9 consolidation of electronic communications that have</p> <p>09:05:08 10 taken place, but they should be completed by the end</p> <p>09:05:09 11 of the day today.</p> <p>09:05:40 12 (Deposition Exhibit Nos. 86-88 marked.)</p> <p>09:05:46 13 Q. (BY MR. TROUT) Sir, I'm going to hand you</p> <p>09:05:49 14 first what has been marked as Deposition Exhibit</p> <p>09:05:53 15 No. 86, and ask if that is one of the three binders</p> <p>09:05:57 16 that was provided to you?</p> <p>09:06:03 17 A. Yes. As it's identified on the cover, it's</p> <p>09:06:04 18 Volume 1.</p> <p>09:06:08 19 Q. All right. Now, sir, I'm going to turn</p> <p>09:06:11 20 Exhibit No. 86 on it's side, and I'm going to point</p> <p>09:06:14 21 out for you, for purposes of our record there are a</p> <p>09:06:17 22 number of sticky notes in this document.</p> <p>09:06:21 23 Do you recognize the handwriting on those</p> <p>09:06:22 24 notes?</p> <p>09:06:25 25 A. I believe -- it is the handwriting of</p> <p>Page 7</p>
<p>09:03:13 1 that would impair your ability to hear, understand, or</p> <p>09:03:16 2 respond to questions today?</p> <p>09:03:18 3 A. Nothing other than the fact I am a little</p> <p>09:03:22 4 hard of hearing, so I may have to ask things to be</p> <p>09:03:24 5 repeated from time to time.</p> <p>09:03:28 6 Q. That's fine. I appreciate that, and I'll do</p> <p>09:03:33 7 my best to make myself loud enough and clear enough</p> <p>09:03:34 8 for you to understand.</p> <p>09:03:38 9 My goal, if it is okay with you, is that we</p> <p>09:03:41 10 have a record today of questions that you have heard</p> <p>09:03:44 11 and understood and responded to clearly.</p> <p>09:03:46 12 Is that okay with you?</p> <p>09:03:46 13 A. Yes.</p> <p>09:03:54 14 MR. TROUT: Okay. Mr. Lemley, you were asked to</p> <p>09:03:58 15 bring a number of documents with you today, and for</p> <p>09:04:11 16 purposes of our record, I am going to have an exhibit</p> <p>09:04:11 17 marked.</p> <p>09:04:11 18 (Deposition Exhibit No. 85 marked.)</p> <p>09:04:15 19 Q. (BY MR. TROUT) I'm going to hand you what's</p> <p>09:04:19 20 been marked as Exhibit No. 85, which is Notice of</p> <p>09:04:20 21 Deposition Duces Tecum.</p> <p>09:04:24 22 Do you recognize that document, sir?</p> <p>09:04:25 23 A. I have seen it, yes.</p> <p>09:04:30 24 Q. All right. You were asked on page 2 to</p> <p>09:04:34 25 bring with you today all documents provided to you by</p> <p>Page 6</p>	<p>09:06:30 1 Mr. Richard Bauer who you met earlier this morning.</p> <p>09:06:35 2 Q. All right. So none of these sticky notes</p> <p>09:06:37 3 contain your handwriting; is that correct?</p> <p>09:06:41 4 A. The bulk of them are his. I didn't say none</p> <p>09:06:47 5 of them are mine. I think that a couple of them are</p> <p>09:06:53 6 markers that I put in the volume so that I could have</p> <p>09:06:55 7 more study done on the issue.</p> <p>09:06:58 8 Q. All right. So with respect to Exhibit</p> <p>09:07:01 9 No. 86, can you identify for me which of the markers</p> <p>09:07:04 10 are yours?</p> <p>09:07:13 11 A. The two pink ones.</p> <p>09:07:19 12 Q. All right. And for purposes of the record,</p> <p>09:07:29 13 referring to Exhibit No. 86, I'm turning to a page</p> <p>09:07:36 14 which was identified with a tab D or Exhibit D.</p> <p>09:07:36 15 A. Yes.</p> <p>09:07:39 16 Q. And can you tell me what you wrote on that</p> <p>09:07:45 17 tab that is your marker?</p> <p>09:07:54 18 A. I believe that -- if I might look at this a</p> <p>09:07:56 19 little closer, sir?</p> <p>09:07:59 20 Q. Sure. Please do.</p> <p>09:08:06 21 A. I circled a matter up here, which is my</p> <p>09:08:12 22 habit, and then there was a response to me from</p> <p>09:08:17 23 Mr. Bauer as set out in this yellow tab.</p> <p>09:08:21 24 Q. Okay. So the yellow tab is Mr. Bauer's</p> <p>09:08:22 25 writing?</p> <p>Page 8</p>

09:08:23 1 A. Yes, sir. I believe it is.  
 09:08:29 2 Q. And whose writing is the pink tab?  
 09:08:32 3 A. I believe that's probably mine, just marking  
 09:08:38 4 the section so that it could be looked at, and as I  
 09:08:45 5 said, I marked on the page itself the things that I  
 09:08:49 6 wanted described and the yellow tab, again,  
 09:08:53 7 describes -- gives me the answer that I had asked for.  
 09:08:55 8 Q. Okay. Could you please read your  
 09:08:59 9 handwritten note that is written in conjunction with  
 09:09:06 10 what is circled in pencil on Exhibit D of Deposition  
 09:09:09 11 Exhibit No. 86.  
 09:09:18 12 A. Yes. It's several names. Ted is one  
 09:09:27 13 name -- Ted Baird, the city attorney, apparently. And  
 09:09:35 14 that was more -- more confirmatory than the yellow tab  
 09:09:40 15 where it does spell out that Ted Baird was the City  
 09:09:40 16 attorney.  
 09:09:43 17 Q. Okay. Can you specifically read for the  
 09:09:47 18 record what your handwritten note is in relationship  
 09:09:50 19 to what you circled.  
 09:09:59 20 A. I circled the word Ted, and I said, Ted,  
 09:10:07 21 with equal marks, and then Ted Baird City Attorney was  
 09:10:12 22 put in there after I turned this book over to  
 09:10:12 23 Mr. Bauer.  
 09:10:16 24 Q. So "Ted Baird City Attorney" is Mr. Bauer's  
 09:10:21 25 handwriting and not yours?

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09:10:22 1 A. I believe that's right, yes.  
 09:10:26 2 Q. Okay. Now, tell me why you circled Ted  
 09:10:27 3 Baird's name.  
 09:10:30 4 A. Well, I was interested in who I was reading  
 09:10:34 5 about when I was going through this significant amount  
 09:10:41 6 of data so that I would have it straight in my mind  
 09:10:46 7 when it came to drafting a report.  
 09:10:54 8 Q. I see. And tell me, did you have some  
 09:11:00 9 discussion with Mr. Bauer regarding the yellow tabbed  
 09:11:08 10 notes on Exhibit D contained within Exhibit No. 86?  
 09:11:08 11 A. Not that I recall.  
 09:11:17 12 Q. Okay.  
 09:11:20 13 A. I probably thanked him when I got the book  
 09:11:21 14 back.  
 09:11:25 15 Q. All right. So I'm now turning to what has  
 09:11:33 16 been marked tab M in Exhibit No. 86. It's the second  
 09:11:39 17 of two pink tabs, and I'm going to ask you, is the  
 09:11:43 18 pink tab on Exhibit M your handwriting?  
 09:11:47 19 A. It looks like it, yes.  
 09:11:54 20 Q. All right. And tell me of what significance  
 09:12:00 21 Exhibit M is in the context of your opinions expressed  
 09:12:02 22 in your report?  
 09:12:26 23 A. Well, let me study the document. The most  
 09:12:29 24 important aspect of that document to me was to try to  
 09:12:37 25 get the numerous players straight and determine what

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09:12:44 1 organization they represented so that as I went  
 09:12:49 2 forward I would be able to know who was speaking and  
 09:12:53 3 on what grounds they had to speak from.  
 09:13:02 4 Q. Okay. And what, if any, conclusions did you  
 09:13:08 5 draw from Exhibit M about any person from the City of  
 09:13:08 6 Meridian?  
 09:13:17 7 A. Well, it confirmed to me that the mayor had  
 09:13:25 8 a conference on the process of the building of the new  
 09:13:29 9 City Hall as it does say -- it does identify the  
 09:13:34 10 subject as the Mayor's Building Committee.  
 09:13:41 11 Q. Any other significance you drew from this  
 09:13:45 12 document with respect to any individual from the City  
 09:13:47 13 of Meridian?  
 09:13:55 14 A. No. I have no particular conclusion about  
 09:13:56 15 any one of them.  
 09:14:01 16 Q. All right. So if I understand your  
 09:14:06 17 testimony, this second pink note is the only other  
 09:14:09 18 personal note you would have made within Exhibit  
 09:14:11 19 No. 86; is that correct?  
 09:14:11 20 A. That's correct.  
 09:14:22 21 Q. Okay. I'm going to hand you what has been  
 09:14:27 22 marked as Exhibit No. 87, and ask you to identify that  
 09:14:29 23 document, please.  
 09:14:32 24 A. It's entitled Volume 2 Exhibits to Affidavit  
 09:14:40 25 of Eugene Bennett, dated April 7th, 2010.

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09:14:48 1 Q. Okay. And for purposes of our record, there  
 09:14:53 2 appear to be a number of sticky notes tabbed in this  
 09:14:53 3 document.  
 09:14:58 4 Are any of those your handwriting?  
 09:15:00 5 A. Well, let me examine them.  
 09:15:29 6 Q. Please do.  
 09:15:33 7 A. They appear to be Mr. Bauer's handwriting.  
 09:15:36 8 I don't recognize that I put any of those sticky notes  
 09:15:37 9 in there.  
 09:15:42 10 Q. Okay. Tell me what, if any, notes you  
 09:15:48 11 personally made in Exhibit 2 -- or excuse me -- in  
 09:15:50 12 Exhibit No. 87.  
 09:15:53 13 A. I don't know that I made any notes in  
 09:15:59 14 Exhibit No. 87. I would have to go back through it to  
 09:16:02 15 recognize any notes that I may have made there.  
 09:16:03 16 Q. All right.  
 09:16:08 17 A. Most of my communication with my immediate  
 09:16:12 18 staff was verbal.  
 09:16:19 19 Q. Who is your immediate staff?  
 09:16:22 20 A. Mr. Richard Bauer. He's a licensed  
 09:16:28 21 professional engineer in Idaho, and he was also the  
 09:16:36 22 project manager on the agent construction management  
 09:16:44 23 contract that we had to restore the capitol and add  
 09:16:45 24 two wings to it.  
 09:16:48 25 Q. All right. Other than Mr. Bauer, is there

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09:16:52	1	anyone else who was a member of your immediate staff	09:20:02	1	sir?
09:16:57	2	that worked on the Meridian City Hall project with	09:20:03	2	A. That would be just fine.
09:16:57	3	you?	09:20:05	3	Q. All right. Good.
09:16:57	4	A. Yes, sir.	09:20:10	4	THE WITNESS: Are you keeping track of this,
09:17:00	5	Q. Who?	09:20:11	5	Counsel?
09:17:05	6	A. Mr. Roy McGlothlin.	09:20:14	6	MR. WALKER: I am. I'm going to send Rich Bauer
09:17:08	7	Q. How spell his last name?	09:20:15	7	an e-mail right now.
09:17:12	8	A. M-c-G-l-o-t-h-i-n.	09:20:19	8	Q. (BY MR. TROUT) So I'm now going to have you
09:17:14	9	Q. And --	09:20:23	9	examine Exhibit No. 88, if you would.
09:17:22	10	A. He is a graduate structural engineer from	09:20:23	10	A. Yes, sir.
09:17:28	11	the University of Idaho, very close to receiving his	09:20:25	11	Q. And tell me what that is.
09:17:31	12	professional engineer's stamp, but waiting for the	09:20:31	12	A. It's a document package concerning this
09:17:32	13	next test.	09:20:38	13	matter, and it contains documents that relate to the
09:17:36	14	Q. So he's currently not a licensed engineer in	09:20:45	14	City of Meridian, the plaintiff and counterdefendant
09:17:38	15	the State of Idaho?	09:20:54	15	versus Petra and the defendant's counterclaimant.
09:17:38	16	A. No.	09:21:02	16	Q. Okay. So I'm going to turn Exhibit No. 88
09:17:41	17	Q. All right. Now, was there anyone else who	09:21:07	17	sideways, and for our record, I'll represent there are
09:17:45	18	was a member of your immediate staff who worked with	09:21:10	18	a number of yellow sticky notes that have been
09:17:50	19	you on the Meridian City Hall project?	09:21:12	19	attached to this exhibit.
09:17:56	20	A. There was no other individual on our staff	09:21:15	20	Are any of those your handwriting, sir?
09:17:59	21	that worked on any of the technical aspects of the	09:21:18	21	A. If you give me a minute, I'll look.
09:18:05	22	Meridian City Hall. We have a chief financial	09:21:22	22	Q. Thank you. Please do.
09:18:10	23	officer, Mr. Randal Hartman, who takes care of the	09:21:53	23	A. None of them appear to be notes that I might
09:18:19	24	billings and whatnot for our firm with our clients.	09:21:53	24	have written.
09:18:23	25	Q. Did Mr. Hartman conduct any analysis of any	09:21:59	25	Q. Okay. Given -- well, first of all, did you
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09:18:27	1	kind with respect to the Meridian City Hall project?	09:22:03	1	read all of the contents of Exhibit No. 88?
09:18:27	2	A. No.	09:22:06	2	A. Yes. I believe I read most of the contents
09:18:29	3	Q. All right. Tell me what analysis was	09:22:10	3	of all three of those volumes.
09:18:33	4	conducted by the graduate engineer who you named?	09:22:12	4	Q. All right. And did you keep track of your
09:18:40	5	A. He had the lead in this commission of ours,	09:22:15	5	time on an hourly basis?
09:18:49	6	and he did most of the initial analysis along with	09:22:15	6	A. I did.
09:18:53	7	myself. I read a lot of the information that he	09:22:18	7	Q. And is there a written record of that time
09:19:01	8	identified as being significant, and then the two of	09:22:22	8	in your billing files or billing system?
09:19:08	9	us generally caucused together before our report was	09:22:23	9	A. There is.
09:19:09	10	developed.	09:22:27	10	Q. How much time did you spend in reading
09:19:12	11	Q. All right. And then tell me what	09:22:31	11	Exhibit No. 88?
09:19:18	12	Mr. Bauer's role was in working on this commission by	09:22:36	12	A. I can't answer that as we sit here, but the
09:19:22	13	Lemley.	09:22:39	13	billing file should have a record of that.
09:19:26	14	A. He had the lead in it. If you need to have	09:22:43	14	Q. All right. And how much time did you spend
09:19:30	15	a title for him, he was the project manager for this	09:22:45	15	reading Exhibit No. 87?
09:19:30	16	particular job.	09:22:50	16	A. It would be the same answer as for Exhibit
09:19:35	17	Q. Okay. And do you have a written engagement	09:22:55	17	No. 88. I kept track of the time, but I worked many
09:19:41	18	letter with Petra Incorporated?	09:23:03	18	days on this, and I can't precisely tell you how much
09:19:45	19	A. We have a written engagement letter with	09:23:08	19	of that time is related to one volume as opposed to
09:19:46	20	Cosho Humphrey.	09:23:09	20	the other here today.
09:19:48	21	Q. All right. Is that a document you are going	09:23:15	21	Q. All right. How do you keep track of your
09:19:51	22	to provide to us later in this day?	09:23:18	22	time? How do you record it?
09:19:54	23	A. It can be provided later in this day, yes.	09:23:27	23	A. I have a daytimer that I record the number
09:19:57	24	Q. Okay. We would ask that you instruct	09:23:37	24	of hours that I work on an individual commission and a
09:20:01	25	Mr. Bauer to provide that to us; is that all right,	09:23:41	25	description of what I did during those hours, and then
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09:28:49 1 I fill out a time sheet, which is signed and turned in  
 09:23:54 2 to our chief financial officer who then converts that  
 09:23:55 3 to a billing.  
 09:24:06 4 Q. All right. When you record your time, do  
 09:24:10 5 you record the individual tasks that you perform?  
 09:24:17 6 A. In broad enough terms that I can satisfy my  
 09:24:21 7 clients that I have performed work during those hours.  
 09:24:27 8 Q. All right. So you record enough of the  
 09:24:32 9 tasks so that there is some particularity to the  
 09:24:38 10 billing to represent what you did; is that correct?  
 09:24:38 11 A. Yes.  
 09:24:51 12 Q. Okay. Would you say that your method of  
 09:24:57 13 recording your time is a standard utilized in the  
 09:25:01 14 construction management industry?  
 09:25:04 15 A. I would say that over the last 20 years I've  
 09:25:12 16 never had my billings challenged, and it's been an  
 09:25:20 17 acceptable method for clients both local, national,  
 09:25:29 18 and international. It represents 20 years of being in  
 09:25:39 19 business and billing a variety of public clients.  
 09:25:42 20 Q. I understand what you just said, but my  
 09:25:44 21 question was slightly different than that. Would you  
 09:25:47 22 say that your method of recording your time would be  
 09:25:51 23 standard for that used by other construction managers  
 09:25:54 24 in your industry?  
 09:25:57 25 MR. WALKER: Objection. Lack of foundation.

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09:26:00 1 THE WITNESS: I have no reason to doubt that it  
 09:26:04 2 wouldn't represent a standard, because I do work on a  
 09:26:08 3 number of projects where there are other consultants  
 09:26:16 4 working, and our reporting and billing is consistent  
 09:26:20 5 with theirs. Now, I don't know what the standard --  
 09:26:26 6 how you define the "standard" in the industry. As  
 09:26:31 7 long as you get an accurate compilation of the time.  
 09:26:50 8 Q. (BY MR. TROUT) All right. I'm sorry. I  
 09:26:53 9 didn't write it down. But what was the name of your  
 09:26:56 10 graduate student again?  
 09:26:59 11 A. Roy McGlothin.  
 09:27:04 12 Q. And how do we correctly spell his name for  
 09:27:05 13 the record?  
 09:27:11 14 A. M-c-G-l-o-t-h-i-n.  
 09:27:22 15 Q. And is Mr. McGlothin a licensed construction  
 09:27:27 16 manager in the State of Idaho?  
 09:27:27 17 A. No, he's not.  
 09:27:32 18 Q. Okay. Is Mr. Bauer a licensed construction  
 09:27:35 19 manager in the State of Idaho?  
 09:27:35 20 A. Yes, he is.  
 09:27:39 21 Q. Are you a licensed construction manager in  
 09:27:41 22 the State of Idaho?  
 09:27:43 23 A. Not individually, no, but the firm is.  
 09:27:47 24 Q. Relying on Mr. Bauer's license; correct?  
 09:27:48 25 A. Primarily, yes.

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09:27:51 1 Q. All right. Other than Mr. Bauer, did you  
 09:27:55 2 have any other licensed construction manager in the  
 09:27:58 3 State of Idaho review this matter?  
 09:27:58 4 A. No.  
 09:28:05 5 Q. All right. Are you a licensed construction  
 09:28:09 6 manager in any other state?  
 09:28:09 7 A. No.  
 09:28:13 8 Q. Are you a licensed civil engineer in the  
 09:28:14 9 State of Idaho?  
 09:28:15 10 A. No.  
 09:28:17 11 Q. Have you ever held a civil engineering  
 09:28:19 12 license in the State of Idaho?  
 09:28:20 13 A. No.  
 09:28:22 14 Q. Have you ever held a civil engineering  
 09:28:25 15 license in any state in the United States?  
 09:28:27 16 A. No.  
 09:28:42 17 Q. Are you familiar with any authoritative  
 09:28:49 18 treatises on construction management?  
 09:28:51 19 A. Yes.  
 09:28:59 20 Q. And what treatises would you consider to be  
 09:29:02 21 authoritative on construction management?  
 09:29:07 22 A. Documents produced by the Construction  
 09:29:08 23 Industry Institute, CII.  
 09:29:10 24 Q. All right.  
 09:29:12 25 A. I might add to your previous questions, I'm

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09:29:20 1 a registered engineer in England and in Europe.  
 09:29:29 2 Q. With respect to the CII treatises, can you  
 09:29:34 3 identify any individual treatise that you would  
 09:29:38 4 consider authoritative on the issue of construction  
 09:29:40 5 management in the state of Idaho?  
 09:29:44 6 A. Well, I have a number of those treatises,  
 09:29:49 7 and they are applicable to construction management any  
 09:29:51 8 place in the United States, I believe.  
 09:29:54 9 Q. All right. Can you tell me specifically  
 09:30:00 10 which treatises you are referring to?  
 09:30:03 11 A. Well, I can't give the titles or the numbers  
 09:30:08 12 off of them right now. I do have them in my office,  
 09:30:09 13 and they could be produced.  
 09:30:11 14 Q. All right. Would you --  
 09:30:15 15 A. I have been an executive with CII for a  
 09:30:21 16 number of years, and worked on the development of a  
 09:30:25 17 lot of those.  
 09:30:27 18 Q. Okay. Would you ask Mr. Bauer to provide us  
 09:30:35 19 with the names and volume numbers, if any, of any of  
 09:30:40 20 the treatises that you consider to be authoritative on  
 09:30:43 21 the issue of construction management as it would  
 09:30:44 22 relate to this project?  
 09:30:49 23 A. I can, indeed, and it may be tomorrow  
 09:30:52 24 morning before you get those, depending on how long  
 09:30:53 25 this deposition runs.

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09:30:57 1 Q. That's fine. I appreciate your courtesy in  
 09:30:58 2 doing that.  
 09:31:01 3 MR. WALKER: Counsel, could you identify the  
 09:31:03 4 company again -- or the institute?  
 09:31:07 5 THE WITNESS: Construction Industry Institute.  
 09:31:08 6 MR. TROUT: Thank you.  
 09:31:10 7 Q. (BY MR. TROUT) Other than treatises  
 09:31:15 8 produced by the Construction Industry Institute, are  
 09:31:19 9 there any other authoritative treatises on  
 09:31:21 10 construction management that you would consider  
 09:31:24 11 appropriate to rely on?  
 09:31:29 12 A. Well, there are textbooks that construction  
 09:31:36 13 management is taught from. A list of those could be  
 09:31:43 14 produced by Boise State. They have a very strong  
 09:31:46 15 construction management program there that I have  
 09:31:51 16 lectured at a number of times every year.  
 09:31:57 17 Q. All right. Is there any single or  
 09:32:02 18 particular textbook that you can identify for me?  
 09:32:03 19 A. No.  
 09:32:08 20 Q. All right. I noted from your curriculum  
 09:32:14 21 vitae that you received a degree in architecture from  
 09:32:15 22 the University of Idaho; is that correct?  
 09:32:15 23 A. That's correct.  
 09:32:18 24 Q. Did you ever become a licensed architect in  
 09:32:20 25 the State of Idaho?

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09:32:20 1 A. No.  
 09:32:24 2 Q. Did you ever become a licensed architect in  
 09:32:25 3 any state?  
 09:32:26 4 A. No.  
 09:32:39 5 Q. Have you personally written any article,  
 09:32:45 6 memorandum, textbook, treatise of any kind on the  
 09:32:47 7 topic of construction management?  
 09:32:47 8 A. I have.  
 09:32:49 9 Q. Can you --  
 09:32:55 10 A. I've been published in the Program  
 09:32:59 11 Management Institute's publications.  
 09:33:03 12 Q. Okay. What is the Program Management  
 09:33:03 13 Institute?  
 09:33:10 14 A. It is an institute that has focused on the  
 09:33:18 15 whole idea of managing projects, whether they be  
 09:33:25 16 building airplanes or new city halls or capitol  
 09:33:27 17 buildings in the State of Idaho.  
 09:33:33 18 Q. Okay. And what specific topic did you write  
 09:33:34 19 on?  
 09:33:39 20 A. I wrote on the Channel Tunnel when I was  
 09:33:47 21 just finishing that, and I gave this speech and paper  
 09:33:53 22 in Vancouver, British Columbia in about 1994.  
 09:33:55 23 Q. Do you have a copy of it?  
 09:33:58 24 A. I may have some place. I would have to  
 09:33:59 25 investigate that.

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09:34:01 1 Q. If you have a copy, would you please provide  
 09:34:02 2 us a copy?  
 09:34:03 3 A. Indeed.  
 09:34:04 4 Q. Thank you.  
 09:34:11 5 Other than that particular paper, have you  
 09:34:18 6 written any other papers, texts, treatises, or  
 09:34:21 7 articles of any kind on construction management?  
 09:34:21 8 A. Probably 80.  
 09:34:25 9 Q. Okay. And where would I find them?  
 09:34:29 10 A. Well, in a variety of publications. I  
 09:34:36 11 can't, as I sit here today -- as you pointed out, I am  
 09:34:41 12 76 years old, and I've been working at this process  
 09:34:46 13 for more than 50 years, and I can't remember each  
 09:34:51 14 individual speech or paper that I have given or  
 09:34:51 15 written.  
 09:34:53 16 Q. Have you kept any of them?  
 09:34:53 17 A. I have.  
 09:34:56 18 Q. To the extent that you have kept any of  
 09:35:00 19 them, will you provide us copies?  
 09:35:01 20 A. Conditionally, yes.  
 09:35:04 21 Q. And what's the condition, sir?  
 09:35:09 22 A. That they never be used for anything except  
 09:35:10 23 this particular litigation.  
 09:35:12 24 Q. That's fine. I have no problem with that.  
 09:35:13 25 Thank you.

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09:35:16 1 A. I don't want somebody stealing my work and  
 09:35:20 2 using it for other purposes. I trust you understand  
 09:35:20 3 that.  
 09:35:23 4 Q. I clearly understand that, and I'll honor  
 09:35:26 5 that request. I appreciate you providing those  
 09:35:27 6 documents to us.  
 09:35:29 7 A. You will now for sure because it's in the  
 09:35:30 8 record.  
 09:35:33 9 Q. Well, sure. I wouldn't say it if it wasn't  
 09:35:34 10 going to be on the record.  
 09:35:36 11 THE WITNESS: May I get a little more coffee,  
 09:35:36 12 sir?  
 09:35:39 13 MR. TROUT: You may. Any time you need a break  
 09:35:40 14 just ask. That's not a problem.  
 09:35:42 15 THE WITNESS: Thank you, sir. I had assumed  
 09:35:46 16 that, but coffee isn't sometimes an urgent matter, but  
 09:35:50 17 I do drink too much coffee, and I felt the need for  
 09:35:53 18 it. I wanted to be alert for your questions.  
 09:35:56 19 MR. TROUT: I appreciate that very much.  
 09:35:56 20 THE WITNESS: Thank you.  
 09:36:06 21 Q. (BY MR. TROUT) Sir, can you tell me what a  
 09:36:09 22 takeoff is?  
 09:36:11 23 A. A takeoff?  
 09:36:12 24 Q. Yes, sir.  
 09:36:20 25 A. Is a process of measurement in order to

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09:36:25	1	establish quantities, whether it be of concrete or	09:40:34	1	construction manager at risk tendered with and the
09:36:29	2	steel or other building material as we are referring	09:40:37	2	design construct contractor on the wings tendered
09:36:39	3	to building constructions. And for concrete, it's	09:40:38	3	with.
09:36:44	4	length times width times height divided by 27.	09:40:42	4	Q. All right. So it's certainly possible, is
09:36:47	5	Q. All right. Have you ever heard the term,	09:40:45	5	it not, sir, for a construction manager to create a
09:36:52	6	takeoff, with respect to labor?	09:40:49	6	takeoff or estimate for the services to be provided on
09:36:52	7	A. I have.	09:40:51	7	any particular project?
09:36:58	8	Q. And how is the phrase, takeoff, used with	09:40:53	8	MR. WALKER: Objection. Lack of foundation.
09:37:00	9	respect to labor?	09:40:59	9	THE WITNESS: If they are provided with the
09:37:04	10	A. When an estimator estimates a project,	09:41:02	10	adequate information against which to do the estimate,
09:37:08	11	usually they start with the quantities involved and	09:41:03	11	that is the case.
09:37:12	12	then they estimate the number of man hours it will	09:41:07	12	On the case of the -- and I'll do a little
09:37:17	13	take to put that amount of material in place in the	09:41:11	13	bragging here. On the case of the capitol renovation,
09:37:18	14	form that the design calls for.	09:41:20	14	we finished it exactly on time and about \$2 million
09:37:24	15	Q. Okay. And do construction managers ever use	09:41:22	15	under budget.
09:37:25	16	takeoffs?	09:41:27	16	Q. (BY MR. TROUT) Let me be more specific.
09:37:25	17	A. Yes.	09:41:32	17	It's certainly possible for a construction manager to
09:37:28	18	Q. And how are they used by construction	09:41:38	18	estimate the number of hours and the types of service
09:37:29	19	managers?	09:41:42	19	a construction manager will provide for a project,
09:37:34	20	A. Usually to verify general contractor's	09:41:44	20	isn't it, sir?
09:37:44	21	tenders and their requirement for materials. They can	09:41:47	21	A. If he's given the ground rules against which
09:37:50	22	be used in a variety of ways, depending on whether the	09:41:50	22	that's going to be measured, yes. It is possible.
09:37:54	23	construction manager is an agent construction manager	09:42:02	23	Q. All right. What does the term "inspection"
09:37:56	24	or a construction manager at risk.	09:42:04	24	mean?
09:38:04	25	Q. Okay. Let's break that down, if we can.	09:42:09	25	A. Inspection can mean a number of things, but
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09:38:22	1	You used the word "tender."	09:42:16	1	primarily the definition of the term is to make sure
09:38:26	2	What is a tender?	09:42:21	2	that the work conforms to the specifications called
09:38:31	3	A. It depends on how a project is solicited	09:42:30	3	for in the design. Now, there is a number of levels
09:38:38	4	both -- in all stages of its development. Normally,	09:42:36	4	of inspection that can be called for that go from a
09:38:49	5	an owner will ask for an architect to propose on a	09:42:41	5	superficial visual inspection to a very detailed
09:38:53	6	project, and their evaluation can be any one of a	09:42:49	6	chemical or physical measurement.
09:39:00	7	number of things. They can do the same thing with a	09:42:54	7	Q. All right. What does the term "construction
09:39:03	8	construction manager and then a general contractor or	09:42:55	8	observation" mean?
09:39:05	9	a series of general contractors.	09:42:58	9	A. That would be an observation of the manner
09:39:11	10	Q. All right, sir; but my specific question is:	09:43:06	10	in which the construction was being done. In some
09:39:14	11	What is a tender as you used that term?	09:43:10	11	ways that could easily be interpreted to be an
09:39:17	12	A. It is a response to a request for a	09:43:11	12	inspection of sorts.
09:39:18	13	proposal.	09:43:17	13	Q. Are the terms synonymous?
09:39:31	14	Q. Okay. Have you, as a construction manager,	09:43:24	14	A. No, they are not synonymous.
09:39:37	15	ever created a takeoff or estimate of the services	09:43:32	15	Q. What, if anything, is the difference between
09:39:40	16	that you would provide for a project?	09:43:37	16	an inspection and an observation in construction?
09:39:41	17	A. Yes.	09:43:46	17	A. Well, an observation can be an observation
09:39:45	18	Q. Okay. Is that common practice?	09:43:51	18	from the standpoint -- it depends on what you are
09:39:49	19	A. In certain instances it is. And some	09:43:59	19	observing. If you are observing progress alone, you
09:39:54	20	clients want a very detailed takeoff, including man	09:44:05	20	are observing conformance to schedule. If you're
09:39:59	21	hours. Other clients are not as demanding as that,	09:44:09	21	observing with a concern toward whether or not the
09:40:06	22	but on the capitol renovation and the construction of	09:44:14	22	contractor is meeting the intent of the specifications
09:40:15	23	the wings there, we provided takeoffs for both the	09:44:21	23	that he bid against, that's another level of
09:40:20	24	capitol building itself as well as the wings and	09:44:22	24	observation.
09:40:25	25	took -- used those to verify the quantities that the	09:44:27	25	Q. Okay. And if you're observing to determine
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09:44:29	1	whether or not the contractor is meeting the	09:48:14	1	A. It's a process by which you measure the
09:44:34	2	specifications he bid against, is that a form of	09:48:18	2	individual items of work so that you know what it
09:44:34	3	quality control?	09:48:24	3	costs, and then you add those all up and that gives
09:44:37	4	A. It's a form of quality control, yes.	09:48:29	4	you an overall cost of the facility. But it would be
09:44:44	5	Q. All right. What's an estimate?	09:48:37	5	breaking down the cost into a number of cost codes,
09:44:50	6	A. Well, an estimate can be a number of things.	09:48:41	6	say, for example, the shades on that window would be a
09:44:54	7	What specifically are you referring to?	09:48:46	7	cost code that would relate to this building cost, and
09:45:00	8	Q. Well, let's put it in the context of	09:48:51	8	you'd have an individual code number that you would
09:45:05	9	construction management services. What would an	09:48:57	9	put against the work that went into buying and
09:45:09	10	estimate of construction management services be?	09:49:04	10	installing those blinds. That summary would then be
09:45:11	11	MR. WALKER: Objection. Lack of foundation.	09:49:06	11	used for a summary for the cost of the building.
09:45:16	12	THE WITNESS: You're asking me to answer that in	09:49:10	12	Q. All right. Now, if we turn our attention
09:45:23	13	a hypothetical?	09:49:16	13	solely to construction management services, is job
09:45:23	14	MR. TROUT: Certainly.	09:49:21	14	cost accounting utilized by Lemley International in
09:45:26	15	THE WITNESS: You would take the facility that	09:49:25	15	the provision of its construction management services?
09:45:34	16	you were to manage, and you would estimate the amount	09:49:25	16	A. Indeed.
09:45:42	17	of time that it would take to schedule and oversee the	09:49:29	17	Q. All right. Would you tell me how Lemley
09:45:47	18	construction contractors so that you would have a	09:49:33	18	International does its job cost accounting for the
09:45:53	19	measurement by which you could judge their	09:49:36	19	provision of construction management services?
09:45:54	20	performance.	09:49:42	20	A. Just as I've described to you. We had -- we
09:45:54	21	MR. TROUT: Okay.	09:49:46	21	had proposed an organization on the capitol renovation
09:45:59	22	Q. (BY MR. TROUT) Is an estimate also used by	09:49:56	22	and construction that was a lump sum number that was
09:46:03	23	construction managers to determine the amount of their	09:50:01	23	derived as a percentage of the overall cost that was
09:46:05	24	fee?	09:50:07	24	estimated, and we kept track of that with monthly
09:46:09	25	A. Yes. That's a reasonable -- that's a	09:50:15	25	reports that were reviewed by the project management
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09:46:11	1	reasonable thing for a construction manager to do.	09:50:18	1	team -- the on-site team as well as myself.
09:46:15	2	Q. Okay. Is that commonly done by construction	09:50:27	2	Q. Okay. Did you keep track of the specific
09:46:18	3	managers in your experience?	09:50:34	3	overhead for your entity, Lemley International, that
09:46:18	4	A. Yes.	09:50:38	4	was attributable to that project while it was ongoing?
09:46:36	5	Q. All right. Is there any treatise that you	09:50:43	5	A. Oh, yes, indeed we did. In fact, they were
09:46:47	6	consider to be authoritative with respect to a	09:50:48	6	housed over here in the Borah building. It was a
09:46:51	7	construction manager's overhead?	09:50:52	7	complete unit that had a sole responsibility to
09:46:54	8	A. It, again, would depend on the type of	09:50:58	8	schedule and manage that entire complex of work.
09:46:59	9	project that the construction manager is to manage.	09:51:01	9	Q. Okay. When you say a, complete unit, was
09:47:02	10	Q. All right.	09:51:05	10	that a discreet set of people?
09:47:06	11	A. And that -- the formation of a question, can	09:51:05	11	A. It was.
09:47:12	12	you give me an estimate, requires a lot of detail in	09:51:09	12	Q. At the same time that you were involved in
09:47:15	13	order for me to answer the question.	09:51:12	13	the management of the capitol project, did you have
09:47:18	14	Q. Okay. Let's narrow it, if we can. With	09:51:16	14	other projects ongoing for Lemley International?
09:47:25	15	respect to a project like the Meridian City Hall, is	09:51:16	15	A. I did.
09:47:29	16	there any treatise that you would consider	09:51:18	16	Q. How many?
09:47:34	17	authoritative on how to calculate what a construction	09:51:27	17	A. Four that I can remember specifically. One
09:47:40	18	manager's overhead would be for that kind of project?	09:51:35	18	was the -- was a major forensic job for the London
09:47:46	19	A. Yes. I think you -- it would be -- the	09:51:43	19	Underground, and I had a team in England housed in
09:47:49	20	treatise you are asking for?	09:51:50	20	London Underground's offices that were discreet to
09:47:51	21	Q. At this point. We'll ask additional	09:52:00	21	that program and that was part of our -- agreed to as
09:47:53	22	questions.	09:52:05	22	part of our cost to do the scope of work that we were
09:47:57	23	A. I think there will be a response to that in	09:52:05	23	asked to do.
09:48:00	24	the CII documents that we'll send you.	09:52:09	24	Q. All right. And, for example, with respect
09:48:07	25	Q. Okay. What is job cost accounting?	09:52:13	25	to the London Underground, did you allocate some
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09:52:18 1 portion of your home office overhead to that project?  
 09:52:18 2 A. Yes, me.  
 09:52:23 3 Q. All right. And did you track that time?  
 09:52:27 4 A. Indeed, the same way that I described to you  
 09:52:29 5 we tracked all of our time.  
 09:52:34 6 Q. And you did that because you're the  
 09:52:37 7 principal in Lemley International?  
 09:52:37 8 A. Yes.  
 09:52:40 9 Q. Are there any other shareholders in Lemley  
 09:52:41 10 International?  
 09:52:42 11 A. My wife.  
 09:52:44 12 Q. Does your wife have an active role in the  
 09:52:45 13 company?  
 09:52:48 14 A. Oh, yes. She runs everything to do with the  
 09:52:50 15 financial side of it. I get an allowance.  
 09:52:54 16 Q. You are doing better than me.  
 09:52:58 17 A. Well, everybody has got their cross to bear.  
 09:53:04 18 Q. That's right. So does your spouse track her  
 09:53:09 19 time as part of your home office overhead?  
 09:53:13 20 A. I don't believe she fills out a time sheet,  
 09:53:21 21 but she and the chief accountant, Mr. Hartman, come to  
 09:53:25 22 an agreement about that about every six months.  
 09:53:32 23 Q. Okay. As to an allocation of her time from  
 09:53:33 24 project to project?  
 09:53:35 25 A. It is not allocated that way.

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09:53:41 1 Q. All right.  
 09:53:43 2 A. It's allocated more on the company's  
 09:53:46 3 performance one quarter to another to another.  
 09:53:52 4 Q. All right. Do you allocate your home office  
 09:53:59 5 expenses on a project by project basis?  
 09:54:02 6 A. We do, but it's done through our hourly  
 09:54:02 7 rates.  
 09:54:05 8 Q. All right. Can you explain that for me,  
 09:54:08 9 please?  
 09:54:14 10 A. We have a set of hourly rates for --  
 09:54:19 11 depending on how experienced the associate is that's  
 09:54:24 12 working on a project that we charge our client, and as  
 09:54:30 13 we do that, it covers all of our printing costs, all  
 09:54:36 14 of our office space costs, electricity, water, et  
 09:54:36 15 cetera, et cetera.  
 09:54:41 16 Q. All right. So is it common, based on your  
 09:54:46 17 understanding in the construction industry, for the  
 09:54:50 18 hourly rates to cover the costs that you just  
 09:54:52 19 described in your previous answer?  
 09:54:56 20 A. If it's understood to the contract that way.  
 09:55:01 21 That's the way we prefer to draft our contracts. It  
 09:55:07 22 can be done in another way. In fact, the federal  
 09:55:12 23 government does it in another way. They have an audit  
 09:55:17 24 process of a big organization and allocate so much  
 09:55:22 25 overhead markup to a Bechtel, MK, or a Flour.

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09:55:26 1 Q. For the purpose of specifically tracking  
 09:55:31 2 those costs on a project-by-project basis; is that  
 09:55:31 3 correct?  
 09:55:31 4 A. Yes.  
 09:55:35 5 Q. And that would be something akin to job  
 09:55:38 6 costs accounting for construction management services;  
 09:55:39 7 correct?  
 09:55:39 8 A. Yes.  
 09:55:53 9 Q. All right. And it's certainly possible, is  
 09:56:08 10 it not, to track office supplies, cell phone costs,  
 09:56:12 11 photocopies, all of those kinds of costs on a  
 09:56:14 12 project-by-project basis; correct?  
 09:56:20 13 A. Yes. And we do that in Lemley  
 09:56:20 14 International.  
 09:56:24 15 Q. And would you say that is a common practice  
 09:56:27 16 in the construction management services industry?  
 09:56:29 17 MR. WALKER: Objection. Lack of foundation.  
 09:56:33 18 THE WITNESS: It's done in the organizations that  
 09:56:36 19 I've worked with. Now, I don't know what the word  
 09:56:41 20 "common" means in the context of this overall  
 09:56:46 21 industry. There is so many different forms and levels  
 09:56:48 22 of organization.  
 09:56:52 23 Q. (BY MR. TROUT) Well, it's certainly not  
 09:56:55 24 difficult for you to do. You just have to plan for  
 09:56:58 25 and do it; correct?

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09:56:59 1 MR. WALKER: Objection. Lack of foundation.  
 09:57:02 2 THE WITNESS: I told you that's how Lemley  
 09:57:06 3 International does it, and if we could do it with a  
 09:57:09 4 small organization, it should get easier with a big  
 09:57:10 5 organization.  
 09:57:10 6 MR. TROUT: Okay.  
 09:57:16 7 Q. (BY MR. TROUT) How many clerical staff do  
 09:57:20 8 you have in your home office?  
 09:57:27 9 A. We have two, and, in fact, one of them mows  
 09:57:30 10 the lawn out in front of the office.  
 09:57:34 11 Q. How many clerical staff did you have in your  
 09:57:40 12 home office during the Idaho State Capitol Building  
 09:57:41 13 Renovation?  
 09:57:43 14 A. I had about six normally.  
 09:57:50 15 Q. Okay. And how big was that project?  
 09:57:51 16 A. 120 million.  
 09:57:53 17 Q. Okay. Were you the construction -- was  
 09:57:57 18 Lemley International the construction manager at risk  
 09:57:58 19 in that project?  
 09:58:02 20 A. No, we were not. We were agent construction  
 09:58:03 21 manager.  
 09:58:07 22 Q. But was there a construction manager at risk  
 09:58:08 23 for that project?  
 09:58:08 24 A. Yes.  
 09:58:12 25 Q. Who?

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9 (Pages 33 to 36)

09:58:15 1 A. Jacobsen Hunt, a Salt Lake City joint  
 09:58:15 2 venture.  
 09:58:23 3 Q. Okay.  
 09:58:26 4 MR. TROUT: Let's go off the record for five  
 09:58:26 5 minutes.  
 10:05:42 6 (Recess taken from 9:58 a.m. to 10:05 a.m.)  
 10:06:09 7 MR. TROUT: Let's go back on the record.  
 10:06:11 8 (Deposition Exhibit No. 89 marked.)  
 10:06:31 9 Q. (BY MR. TROUT) Sir, you've been handed what  
 10:06:36 10 has been marked as Deposition No. 89, and I'm going to  
 10:06:40 11 ask you whether or not you've ever seen this  
 10:06:43 12 organizational chart before?  
 10:06:44 13 A. I have.  
 10:06:49 14 Q. Would I be correct in understanding that  
 10:06:57 15 this would be an appropriate depiction of a  
 10:07:01 16 construction manager at risk situation where there are  
 10:07:09 17 direct subcontractors under the construction manager?  
 10:07:17 18 A. It could be a -- it could be used as an  
 10:07:25 19 organogram to illustrate that, but there is no  
 10:07:30 20 absolute as to whether or not that the subcontractors  
 10:07:38 21 for a construction manager at risk -- contracts are  
 10:07:41 22 held by the construction manager at risk or by the  
 10:07:46 23 owner. That would be a separate agreement between the  
 10:07:52 24 construction manager at risk and the trade  
 10:07:52 25 contractors.

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10:07:58 1 Q. Okay. But would I be correct in  
 10:08:01 2 understanding, at least as far as this depiction goes,  
 10:08:08 3 that this would reflect a construction manager who had  
 10:08:12 4 contracted directly with subcontractors for purposes  
 10:08:13 5 of the project?  
 10:08:20 6 A. That is the way this organogram shows it,  
 10:08:20 7 yes.  
 10:08:25 8 (Deposition Exhibit No. 90 marked.)  
 10:08:41 9 Q. (BY MR. TROUT) I've handed you what has  
 10:08:48 10 been marked as Exhibit No. 90 for identification.  
 10:08:48 11 A. Yes, sir.  
 10:08:54 12 Q. And do you recognize that organogram?  
 10:08:56 13 A. It looks familiar, yes.  
 10:08:59 14 Q. What do you recognize this one to be?  
 10:09:10 15 A. Well, a construction manager -- an agent  
 10:09:22 16 type construction management outline where the  
 10:09:26 17 contractors -- where there were dual contractors,  
 10:09:29 18 general contractors, and they each had subcontractors  
 10:09:34 19 contracted to them for various elements of the work.  
 10:09:37 20 Q. All right.  
 10:09:43 21 A. And all of the contracts were held by the  
 10:09:44 22 owner.  
 10:09:55 23 Q. All right. As comparing Exhibits No. 89 and  
 10:09:56 24 Exhibit No. 90 --  
 10:09:57 25 A. Yes.

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10:10:03 1 Q. -- which do you believe accurately reflects  
 10:10:08 2 the contractual organization for the Meridian City  
 10:10:11 3 Hall project?  
 10:10:51 4 A. I believe that Exhibit No. 90 more  
 10:10:54 5 accurately reflects the Meridian City Hall.  
 10:10:57 6 Q. Okay. Tell me why.  
 10:11:01 7 A. Because the owner is holding the contracts  
 10:11:05 8 directly. They are not being held through a  
 10:11:06 9 construction manager.  
 10:11:14 10 Q. All right. And, of course, you would  
 10:11:19 11 assume, would you not, sir, that Petra in the  
 10:11:27 12 performance of its duties would understand that  
 10:11:31 13 Exhibit No. 90 would more accurately reflect the  
 10:11:34 14 contractual organization for the project?  
 10:11:37 15 MR. WALKER: Objection. Calls for speculation.  
 10:11:40 16 THE WITNESS: I don't know how they would look at  
 10:11:47 17 it, but it looks to me like it's more reflective of my  
 10:11:50 18 understanding of what went on there.  
 10:11:55 19 Q. (BY MR. TROUT) All right. Would it be your  
 10:12:02 20 opinion that a construction manager exercising  
 10:12:10 21 ordinary care in the state of Idaho would correctly  
 10:12:13 22 understand Exhibit No. 90 to be the correct  
 10:12:14 23 representation of the contractual organization  
 10:12:18 24 relationship for the Meridian City Hall project?  
 10:12:20 25 MR. WALKER: Objection. Lack of foundation.

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10:12:27 1 THE WITNESS: Well, I think that it very clearly  
 10:12:34 2 sets out the fact that the owner has a construction  
 10:12:40 3 manager advisor, and the owner is holding all of the  
 10:12:51 4 contractors contracts in their name.  
 10:12:54 5 Q. (BY MR. TROUT) Well, my specific question  
 10:13:00 6 for you, sir, is: In your professional opinion, would  
 10:13:05 7 a construction manager in the state of Idaho for the  
 10:13:11 8 Meridian City Hall project exercising ordinary care  
 10:13:19 9 understand that the correct contractual organogram for  
 10:13:24 10 the Meridian City Hall project would be reflected by  
 10:13:26 11 Exhibit No. 90?  
 10:13:37 12 A. Under the contracts as they were led, yes.  
 10:13:41 13 Q. All right. As it relates to construction  
 10:13:46 14 management, are you familiar with the term  
 10:13:50 15 "fiduciary"?  
 10:13:53 16 A. I've heard the term, yes, and I think that's  
 10:14:01 17 something that is more in the legal realm to define.  
 10:14:12 18 I think that fidelity is a term that I've always used  
 10:14:20 19 in my contracts with anyone, whether I was a general  
 10:14:26 20 contractor or a construction manager. I felt that I  
 10:14:35 21 had -- had a fidelity to my client.  
 10:14:40 22 Q. What does the term fidelity mean to you?  
 10:14:43 23 A. It means that I'm looking after his best  
 10:14:48 24 interests in all circumstances, including financial  
 10:14:56 25 circumstances and not hiding information from a client

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10 (Pages 37 to 40)

10:15:05	1	or trying to utilize a change in a project's position	10:18:45	1	Q. All right. And does that example which you
10:15:08	2	for self enrichment.	10:18:50	2	have just provided to me apply with respect to a
10:15:15	3	Q. Okay. Would your understanding of the term	10:19:00	3	construction manager's duties to coordinate the work
10:15:22	4	fiduciary be equivalent to your use of the term	10:19:06	4	effort of various contractors on a project?
10:15:23	5	fidelity?	10:19:09	5	A. Yes, as long as their contract with the
10:15:25	6	MR. WALKER: Objection. Lack of foundation.	10:19:15	6	owner gave them authority to see to that
10:15:28	7	THE WITNESS: I think you'd have to tell me what	10:19:15	7	implementation.
10:15:35	8	you think fiduciary is. I think there are areas that	10:19:45	8	MR. TROUT: All right. Sir, I'm going to have
10:15:46	9	I have very broad familiarity with, such as trusts,	10:19:51	9	the court reporter hand you a notebook which contains
10:15:50	10	where a trustee would have a fiduciary responsibility	10:20:24	10	Exhibit No. 2 for this project, and then I'll ask you
10:15:53	11	as defined by the law.	10:20:26	11	a few questions about it.
10:15:55	12	Q. (BY MR. TROUT) In that context, what does	10:20:45	12	Q. (BY MR. TROUT) Before we get to Exhibit --
10:15:58	13	the term fiduciary mean to you?	10:20:48	13	well, we'll ask this in the context of Exhibit No. 2.
10:16:01	14	MR. WALKER: Objection. Calls for a legal	10:20:55	14	Sir, can you identify Exhibit No. 2?
10:16:01	15	conclusion.	10:21:03	15	A. Well, it's an exhibit with a lot of Petra's
10:16:05	16	THE WITNESS: It means essentially the same thing	10:21:09	16	information in it.
10:16:13	17	as fidelity, but with more particular definition that	10:21:12	17	Q. Well, can you tell me specifically what
10:16:13	18	went with it.	10:21:16	18	Exhibit No. 2 is?
10:16:16	19	Q. (BY MR. TROUT) Does it have a higher	10:21:22	19	A. Well, just let me look at it a little more
10:16:18	20	standard of care associated with it?	10:21:24	20	carefully.
10:16:18	21	A. Probably, yes.	10:21:28	21	Q. All right, sir.
10:16:23	22	Q. All right. Now, in your work on this	10:21:34	22	A. Well, it's the basis of the contract, I
10:16:28	23	project, have you endeavored to provide any legal	10:21:39	23	believe, between the City of Meridian and Petra.
10:16:28	24	opinions?	10:21:53	24	Q. All right. Is the contract between the City
10:16:29	25	A. No.	10:22:02	25	of Meridian and Petra typical of contracts utilized in
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10:16:34	1	Q. And would it be a fair statement -- and I'm	10:22:05	1	the construction management industry in the state of
10:16:40	2	not being facetious here, so bear with me. Would it	10:22:06	2	Idaho?
10:16:43	3	be a fair statement to say you are not trained as a	10:22:09	3	MR. WALKER: Objection. Vague as to the term,
10:16:45	4	lawyer?	10:22:10	4	typical.
10:16:46	5	A. We've established that, yes.	10:22:15	5	THE WITNESS: Well, I think each construction
10:16:49	6	Q. And you do not have the expertise to provide	10:22:24	6	management contract is specific for an individual job,
10:16:53	7	legal opinions with respect to that project; correct?	10:22:31	7	depending on the sophistication of the owner and their
10:17:00	8	A. That's correct. Other than my experience in	10:22:40	8	need for a levels of support by a construction
10:17:08	9	similar situations over the years and seeing how they	10:22:45	9	manager, so I don't think there is such a thing as a
10:17:10	10	were handled and concluded.	10:22:46	10	typical contract.
10:17:27	11	Q. All right. In the field of construction	10:22:47	11	MR. TROUT: All right.
10:17:33	12	management, as you understand it, does the term	10:22:50	12	Q. (BY MR. TROUT) Based upon your work in this
10:17:39	13	implement have any specific meaning to you?	10:22:57	13	case, describe for me, if you would, please, the City
10:17:47	14	A. Well, yes. Implement is a term of action	10:23:06	14	of Meridian's level of need for support in the
10:17:54	15	that requires a certain action to implement a	10:23:11	15	Meridian City Hall project.
10:18:00	16	procedure or a piece of work.	10:23:17	16	A. I believe the City of Meridian required very
10:18:05	17	Q. And as it relates to a construction	10:23:26	17	significant level of support as a construction
10:18:09	18	manager's activities, what does that phrase mean to	10:23:30	18	manager, and I was more than a little disappointed
10:18:12	19	you, or that word mean to you?	10:23:42	19	that the City of Meridian had not utilized their
10:18:19	20	A. Well, as an example, I would expect a	10:23:46	20	construction manager to manage the architect's work as
10:18:25	21	construction manager to implement first the	10:23:51	21	well as the number of general contractors. So I think
10:18:30	22	development of a schedule, and second, that they would	10:23:56	22	they were very short of sophisticated oversight.
10:18:33	23	then take that schedule and implement the activities	10:24:09	23	Q. All right. In your curriculum vitae, you
10:18:38	24	called for on the schedule at the times they were	10:24:22	24	indicate that you worked on an audit for Central
10:18:39	25	called for.	10:24:27	25	Artery Tunnel, Boston, Massachusetts; is that correct?
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10:24:27 1 A. That's correct.  
 10:24:31 2 Q. And who employed you in that particular job?  
 10:24:36 3 A. The Turnpike Authority of Massachusetts.  
 10:24:39 4 Q. All right. Did you have a letter of  
 10:24:40 5 engagement with them?  
 10:24:41 6 A. I did.  
 10:24:44 7 Q. Would you be so kind to provide a copy of  
 10:24:48 8 that letter of engagement recognizing, of course, that  
 10:24:52 9 we will keep it confidential to these proceedings?  
 10:24:56 10 A. I see no reason not to, unless I'm advised  
 10:25:00 11 by Counsel that it isn't germane.  
 10:25:03 12 MR. WALKER: What is it we are looking for again,  
 10:25:04 13 Kim?  
 10:25:06 14 MR. TROUT: His engagement letter for the audit  
 10:25:11 15 performance of the Central Artery Tunnel, Boston,  
 10:25:13 16 Massachusetts -- with the Massachusetts Turnpike  
 10:25:17 17 Authority, if I understand correctly?  
 10:25:20 18 THE WITNESS: That's correct.  
 10:25:20 19 MR. TROUT: Okay.  
 10:25:24 20 THE WITNESS: That was to audit the management of  
 10:25:32 21 the entire program, and I did a second audit, which  
 10:25:45 22 was a quality audit after the complex was opened to  
 10:25:45 23 traffic.  
 10:25:48 24 Q. (BY MR. TROUT) In what year did you perform  
 10:25:50 25 that work?

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10:25:55 1 A. The first one I performed in '94.  
 10:25:56 2 Q. And the second?  
 10:25:59 3 A. The second, I performed about four years  
 10:25:59 4 ago.  
 10:26:02 5 Q. All right. Now, in your curriculum vitae  
 10:26:09 6 you say it's an audit of the performance by the PM.  
 10:26:12 7 What is a PM?  
 10:26:13 8 A. Program manager.  
 10:26:18 9 Q. Was the program manager in that particular  
 10:26:24 10 project performing similar services to a construction  
 10:26:25 11 manager?  
 10:26:34 12 A. Similar services, but a bit expanded as they  
 10:26:40 13 were also doing some preliminary design work, and then  
 10:26:49 14 they were implementing the designs.  
 10:26:53 15 Q. All right. In that project, did the PM have  
 10:26:54 16 design responsibility?  
 10:26:59 17 A. He had some conceptual design  
 10:27:02 18 responsibility, but no detail design responsibility.  
 10:27:07 19 Q. What is conceptual design responsibility?  
 10:27:11 20 A. Well, I would suggest that the Petra  
 10:27:17 21 contract was a -- is a good example of a conceptual  
 10:27:21 22 design responsibility where Petra was told that they  
 10:27:28 23 were going to do an 80,000 square foot Class A office  
 10:27:35 24 building on a given site. That's a conceptual design.  
 10:27:39 25 That's about as vague as you can get.

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10:27:39 1 MR. TROUT: All right.  
 10:27:43 2 Q. (BY MR. TROUT) Let's clarify something, if  
 10:27:48 3 we can. Turning your attention in Exhibit No. 2, if  
 10:28:02 4 you would, please, to page -- well, before we get  
 10:28:12 5 there, let me ask additional background questions.  
 10:28:17 6 With respect to your Central Artery Project,  
 10:28:22 7 you said there was an analysis of over charges; is  
 10:28:22 8 that correct?  
 10:28:23 9 A. Yes.  
 10:28:30 10 Q. Tell me what you were looking for in your  
 10:28:34 11 audit that would be evidence of over charges.  
 10:28:39 12 A. Well, the first thing that we started with,  
 10:28:45 13 of course, is the contract, and then we -- the first  
 10:28:50 14 phase of it was to audit the organization of the  
 10:28:55 15 program management team, which was Bechtel Corporation  
 10:29:02 16 and Parsons Brinckerhoff. The second phase was to  
 10:29:09 17 audit the team that the Turnpike Authority had on the  
 10:29:20 18 project. And we found that the Bechtel team was  
 10:29:26 19 relatively competent, but they were faced with a  
 10:29:33 20 totally incompetent Turnpike Authority team, and we  
 10:29:41 21 felt that the program manager had taken advantage of  
 10:29:48 22 the fact that they had a very weak team facing them  
 10:29:54 23 and had overcharged for all of their services.  
 10:30:02 24 In broad terms, in 1985, Bechtel had  
 10:30:05 25 proposed to do this job and had told the State of

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10:30:10 1 Massachusetts that it would cost two-and-a-half  
 10:30:17 2 billion dollars. When we did the audit,  
 10:30:23 3 Bechtel/Parsons Brinckerhoff had charged the owner for  
 10:30:27 4 their fee, two-and-a-half billion dollars, while  
 10:30:32 5 achieving very little of the physical work, and we  
 10:30:36 6 estimated the physical work was then going to cost \$15  
 10:30:42 7 billion. So they misrepresented the project, and then  
 10:30:46 8 they charged as though it was going just as it should  
 10:30:50 9 have gone, and it wasn't going well at all.  
 10:30:52 10 Q. Okay. So one --  
 10:30:55 11 A. And that was proven up in the quality audit.  
 10:31:01 12 Q. Okay. So if I were to break down a bit what  
 10:31:12 13 you just said, the weakness of the owner's team was a  
 10:31:14 14 factor which you considered in your review?  
 10:31:17 15 A. Yes, it was. And our report that was issued  
 10:31:24 16 advised the State of Massachusetts to completely  
 10:31:29 17 reorganize their oversight of the project.  
 10:31:33 18 Q. And if we can, would you mind providing us  
 10:31:38 19 with a copy of that report as well, again, with the  
 10:31:42 20 notation that it will be held in strict confidence for  
 10:31:43 21 this litigation?  
 10:31:47 22 A. Yes. I've got it some place. It may take  
 10:31:51 23 us a little while to find it. That's back in the past  
 10:31:52 24 a little ways.  
 10:31:54 25 Q. I understand that.

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12 (Pages 45 to 48)

10:31:58 1 A. But we have a storage room full of about 600  
 10:32:00 2 boxes of that kind of stuff.  
 10:32:02 3 Q. Okay. What was it about the weakness of the  
 10:32:08 4 owner's team that you considered to be of concern or  
 10:32:11 5 that had an impact in your analysis?  
 10:32:15 6 A. In the first instance, they had a lawyer as  
 10:32:19 7 a general manager, and he'd never built anything, so  
 10:32:25 8 he didn't have a clue what he should be doing. His  
 10:32:32 9 administrative assistant was a retired general from  
 10:32:36 10 the Tank Corp. He had never built anything either.  
 10:32:41 11 They had no financial officer, and their chief  
 10:32:45 12 engineer was an architect who had only worked on one  
 10:32:48 13 low cost housing project, never a transportation  
 10:32:52 14 project. So we recommended that they change all of  
 10:32:57 15 those people, get rid of all of them, and we cautioned  
 10:33:05 16 them in one place that they didn't listen to us. We  
 10:33:11 17 said, for God's sake, don't let your program manager  
 10:33:16 18 corrupt your organization. The owner needs to have an  
 10:33:19 19 organization regardless of how this contract is  
 10:33:19 20 written.  
 10:33:21 21 Q. Okay.  
 10:33:29 22 A. I have never seen a very successful job -- a  
 10:33:33 23 lot of them get done, but I don't consider them  
 10:33:36 24 successful without an owner's organization that knows  
 10:33:38 25 what the hell they are about.

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10:33:44 1 Q. Okay. Did you conclude that the contracting  
 10:33:48 2 team Bechtel included took advantage of the weakness  
 10:33:51 3 in knowledge of the owner's team?  
 10:33:52 4 A. I did.  
 10:34:05 5 Q. Okay. And with respect to overcharge; is  
 10:34:06 6 that correct?  
 10:34:10 7 A. Well, overcharges and just not making any  
 10:34:14 8 progress with the critical items of work.  
 10:34:19 9 Q. Okay.  
 10:34:21 10 A. Their people were there, but they weren't  
 10:34:24 11 getting done the job as the critical path called for.  
 10:34:31 12 Q. Okay. And, of course, I would be correct in  
 10:34:35 13 understanding that it was the Bechtel team that was  
 10:34:41 14 responsible for managing and coordinating the work on  
 10:34:42 15 the critical path?  
 10:34:43 16 A. Yes.  
 10:34:54 17 Q. Okay. Now, turning our attention to  
 10:35:07 18 construction management. In your work as a  
 10:35:13 19 construction manager representing an owner as an agent  
 10:35:17 20 during construction, are you familiar with the change  
 10:35:19 21 order process?  
 10:35:20 22 A. Yes.  
 10:35:27 23 Q. Okay. Just conceptually, can you tell me  
 10:35:30 24 how the change order process should, in your opinion,  
 10:35:32 25 work?

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10:35:40 1 A. Well, as an unexpected condition arises, the  
 10:35:43 2 construction manager should put the client on notice  
 10:35:50 3 that there is a condition that wasn't anticipated in  
 10:35:51 4 the original tender for the project.  
 10:35:54 5 Q. Okay. Then what?  
 10:35:59 6 A. The owner should ask for a cost estimate  
 10:36:06 7 from the construction manager who then provides that.  
 10:36:13 8 The owner should review it, and if they agree that  
 10:36:18 9 it's a reasonable estimate and that there is a change,  
 10:36:19 10 issue a change order.  
 10:36:21 11 Q. What if they don't agree?  
 10:36:26 12 A. Well, if they don't agree, the owner has a  
 10:36:27 13 choice.  
 10:36:28 14 Q. And what's that?  
 10:36:32 15 A. The owner can take that part of work from  
 10:36:35 16 the construction manager and call somebody else in to  
 10:36:36 17 do it.  
 10:36:40 18 Q. Okay. Are there any other choices?  
 10:36:45 19 A. Well, there are many, many choices. I had  
 10:36:51 20 an owner once tell me -- in a change order we  
 10:36:59 21 negotiated over price for a very long time, and he  
 10:37:03 22 wanted me to do it for less than my cost. This was on  
 10:37:07 23 the Channel Tunnel, and I said, I wouldn't. And it  
 10:37:11 24 was on the critical path. And he said, well, how  
 10:37:17 25 about if I pay you your cost to go out and buy the

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10:37:22 1 pipe and the pipe supports, and I said, well, on that  
 10:37:28 2 basis, I'll go out and buy the material. And I did  
 10:37:33 3 that and had it all on site, and then he issued a  
 10:37:40 4 unilateral change order that ordered us to do the work  
 10:37:49 5 for a price less than our cost. I told him -- before  
 10:37:54 6 all that happened, I said I wouldn't do it. So I  
 10:37:59 7 wrote him a letter and said I was going to stop that  
 10:38:00 8 work.  
 10:38:01 9 Q. Okay. And did you?  
 10:38:02 10 A. No.  
 10:38:04 11 Q. Why not?  
 10:38:07 12 A. Because I had a contract that said I had an  
 10:38:12 13 obligation to complete the project. But there was  
 10:38:15 14 also a clause in the contract that nothing could be  
 10:38:24 15 taken to court with the exception of a certified  
 10:38:26 16 unpaid pay estimate.  
 10:38:33 17 So I took them to court over that in France,  
 10:38:38 18 and I got a motion for summary judgment for 80 million  
 10:38:44 19 pounds, and that essentially bankrupted Eurotunnel.  
 10:38:50 20 And at that point, Eurotunnel was so mad at me they  
 10:38:55 21 took the pipe issue to court. The judge -- and they  
 10:39:00 22 took it to court in England, and the judge in the case  
 10:39:03 23 got interested in it, regardless of the contract that  
 10:39:09 24 said everything had to go through a disputes  
 10:39:13 25 adjudication board before it could go to a court.

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13 (Pages 49 to 52)



10:39:15 1 But the judge got interested in it and wrote  
 10:39:22 2 an opinion that was very critical of me and the  
 10:39:28 3 contractor, so I appealed it to the appellate court,  
 10:39:36 4 and they reversed the lower court. And the Eurotunnel  
 10:39:40 5 was so mad at me that they took it to the House of  
 10:39:43 6 Lords, which is as far as you can go with it, and the  
 10:39:46 7 House of Lords confirmed the appellate court decision  
 10:39:52 8 and awarded us 250 million pounds in legal fees. So  
 10:39:58 9 we negotiated a fair price, and I went back to work at  
 10:39:58 10 full speed.  
 10:40:05 11 Q. Okay. Well, let's get back to this case, if  
 10:40:05 12 we can.  
 10:40:07 13 A. Fine.  
 10:40:13 14 Q. Tell me how, under the contracts in the  
 10:40:22 15 Meridian City Hall project, a change order for any one  
 10:40:27 16 of the general contractors was to be processed.  
 10:40:31 17 A. Well, it would be processed in the first  
 10:40:36 18 instance by Petra, and they would make a  
 10:40:44 19 recommendation to the City concerning the efficacy of  
 10:40:50 20 the change being requested, and the City would then  
 10:40:58 21 take it on to decide whether it was, one, a reasonable  
 10:41:02 22 request, and two, whether Petra's recommendation was  
 10:41:04 23 properly made.  
 10:41:12 24 Q. Okay. And what analysis would be undertaken  
 10:41:20 25 by Petra in determining the efficacy of the change, as

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10:41:21 1 you use that phrase?  
 10:41:25 2 A. Well, they would define the impact of the  
 10:41:31 3 change on the schedule, the progress of the  
 10:41:43 4 subcontractor that was asking for a change, and in the  
 10:41:52 5 event of the hazardous material that slowed the  
 10:41:55 6 project up that it had to be removed by law, and there  
 10:42:01 7 was a certain cost connected with it, and as I  
 10:42:11 8 understand it, the costs were paid but the impact of  
 10:42:15 9 the schedule weren't fully -- the impact on the  
 10:42:18 10 schedule weren't fully appreciated.  
 10:42:22 11 Q. Well, let's set aside hazardous material for  
 10:42:23 12 a moment.  
 10:42:29 13 How would the efficacy of a requested change  
 10:42:36 14 be analyzed by Petra with respect to any change  
 10:42:40 15 requested by a contractor on this project?  
 10:42:45 16 A. They would take the architect's design and  
 10:42:53 17 specification and compare the work that the contractor  
 10:43:00 18 was having to do relative to that identified element  
 10:43:04 19 of the design and specification, and then they would  
 10:43:15 20 draw a conclusion about whether this was proper and,  
 10:43:20 21 in fact, a change to the original design and  
 10:43:25 22 specification, or had the contractor simply missed it  
 10:43:32 23 in his bid and bid it improperly for the work.  
 10:43:35 24 Q. All right. So a comparison would be  
 10:43:38 25 required to determine whether or not there was a

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10:43:40 1 change; is that correct?  
 10:43:47 2 A. That is correct. In the instance of the  
 10:43:52 3 Meridian City Hall, I don't believe the contractors  
 10:44:01 4 were required to escrow their bids, so comparing what  
 10:44:07 5 the contractor was asking for with regard to the  
 10:44:13 6 change, assuming that there was a change, the quantum  
 10:44:17 7 would be something that would have to be negotiated.  
 10:44:22 8 Q. And when you talk about quantum, are you  
 10:44:24 9 talking about time or money?  
 10:44:24 10 A. Both.  
 10:44:28 11 Q. All right. So would I be correct in  
 10:44:32 12 understanding that to appropriately process a change  
 10:44:39 13 order a comparison between what was anticipated to be  
 10:44:43 14 done versus what was requested to be done would have  
 10:44:47 15 to be made?  
 10:44:53 16 A. I'd ask you to rephrase that. I'm not sure  
 10:44:54 17 I understood it, sir.  
 10:45:01 18 Q. Okay. Well, let's just take, time, as the  
 10:45:08 19 first element. In order to determine whether or not a  
 10:45:12 20 change occurred, you'd have to understand how much  
 10:45:17 21 time was originally planned; correct?  
 10:45:24 22 A. Yes. And when in the season of the year it  
 10:45:25 23 was planned to be done.  
 10:45:32 24 Q. All right. And in analyzing a requested  
 10:45:38 25 change, you would have to then quantify how much

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10:45:41 1 additional time was being requested; is that correct?  
 10:45:46 2 A. Yes, and that would -- would also have to be  
 10:45:53 3 studied with regard to the time of year that the work  
 10:46:00 4 was being done. As an example, it's not usual to do  
 10:46:06 5 excavation work in a rainy season. It's better to do  
 10:46:12 6 it in a dry season. And in the case of outside work  
 10:46:18 7 that has to be done, it's more expensive and takes  
 10:46:26 8 longer in an adverse weather condition than it does in  
 10:46:29 9 a weather condition that is favorable for it.  
 10:46:55 10 Q. Okay. And with respect to cost, would it be  
 10:47:00 11 reasonable to require that the contractor provide an  
 10:47:10 12 estimate of the increased cost in hours and dollars so  
 10:47:14 13 that the construction manager could analyze that to  
 10:47:21 14 determine whether it was equitable?  
 10:47:23 15 A. Yes. It would be if the conditions were  
 10:47:28 16 definable to the point that the performance period was  
 10:47:31 17 exactly as it was anticipated in the original  
 10:47:31 18 schedule.  
 10:47:41 19 Q. Okay. And in order to be definable, would I  
 10:47:46 20 be correct in understanding that one would have to  
 10:47:49 21 know each of the elements of the work that was  
 10:47:52 22 anticipated being performed?  
 10:47:54 23 A. Yes.  
 10:48:09 24 Q. All right. And if each of the elements of  
 10:48:15 25 the work that was anticipated being performed was

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10:48:25 1 known to the contractor, would it be your expectation  
 10:48:28 2 that the contractor ought to be able to estimate the  
 10:48:32 3 number of hours and the costs for the performance of  
 10:48:35 4 each of those elements?

10:48:38 5 A. As long as they knew what time of year the  
 10:48:42 6 work was going to be done in, if an excavation  
 10:48:46 7 contractor could give you a very accurate estimate  
 10:48:50 8 about the number of truck loads of material they had  
 10:48:56 9 to haul away and what that would encompass in the  
 10:48:57 10 summer as opposed to the winter.

10:49:04 11 Q. Okay. I understand your answer.

10:49:11 12 Are there any other factors other than time  
 10:49:18 13 of year that would impact the ability of the  
 10:49:24 14 contractor to estimate the number of hours and the  
 10:49:32 15 cost if they knew the scope of work to be performed?

10:49:35 16 A. And when it was to be performed.

10:49:38 17 Q. Understood. I understand the when, but  
 10:49:39 18 taking when out --

10:49:42 19 A. The only other issue that I can think of  
 10:49:47 20 would be whether there was a general labor shortage in  
 10:49:54 21 the area which would affect contractors ability to  
 10:50:02 22 attract labor, and if that happened after the contract  
 10:50:06 23 was bid, the contractor would have to shoulder the  
 10:50:10 24 cost of retaining the labor that he required to do the  
 10:50:15 25 work. That's a contractor's risk.

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10:52:28 1 performed; correct?  
 10:52:29 2 A. Right. Yes.  
 10:52:32 3 Q. Okay. And would I be correct in  
 10:52:35 4 understanding that as a CM agent representing -- and  
 10:52:41 5 when I use the word CM, can you and I agree that means  
 10:52:42 6 construction manager?

10:52:42 7 A. Yes.

10:52:45 8 Q. All right. In this context, would I be  
 10:52:48 9 correct in understanding you as a CM agent for the  
 10:52:52 10 owner would only be willing to consider compensating  
 10:52:57 11 for actual hours incurred in furtherance of the change  
 10:53:01 12 that was defined in the scope of work; correct?

10:53:01 13 A. Yes.

10:53:10 14 Q. Okay. You are not going to authorize  
 10:53:14 15 payment as a CM agent for the owner just because the  
 10:53:16 16 contractor is a good guy?

10:53:18 17 A. No, of course not.

10:53:21 18 Q. Okay. What's a schedule of values?

10:53:28 19 A. It's a schedule that has a break down of  
 10:53:33 20 aspects of the work against which a value is placed.

10:53:39 21 Q. Why is a schedule of values used in  
 10:53:41 22 construction projects?

10:53:46 23 A. To help measure progress and to see that  
 10:53:52 24 there is a proper payment between the owner and the  
 10:53:52 25 contractor.

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10:50:20 1 Q. Sure. Exclusive of a labor shortage and  
 10:50:25 2 exclusive of the when or weather impact, would you as  
 10:50:31 3 a construction manager reasonably expect any  
 10:50:35 4 contractor who had a defined or known scope of work to  
 10:50:39 5 be able to estimate the labor and the costs of that  
 10:50:42 6 labor for that work?

10:50:51 7 A. I would, unless it was a feature of work  
 10:50:54 8 that had not been used in the area and the contractor  
 10:50:58 9 had little or no experience with performing it.

10:51:11 10 Q. Okay. Fair enough. In analyzing a change  
 10:51:21 11 order with a known scope of work, would you as a  
 10:51:28 12 construction manager agent representing an owner  
 10:51:35 13 consider it appropriate to pay for any hours of work  
 10:51:45 14 that were not directly related to the change?

10:51:48 15 A. It would be highly unlikely.

10:51:50 16 Q. Tell me why.

10:51:53 17 A. Because it would be assumed that the  
 10:51:58 18 contractor was competent to do the work, and he would  
 10:52:03 19 have a hold on the costs that it would require.

10:52:09 20 Q. Okay. To give you an example, you wouldn't  
 10:52:14 21 as a construction manager agent representing an owner  
 10:52:18 22 be compensating the contractor for sending his  
 10:52:21 23 employees out to buy groceries?

10:52:21 24 A. No.

10:52:26 25 Q. Okay. Not reasonably related to the work

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10:54:00 1 Q. Okay. When you say, proper payment, what do  
 10:54:03 2 you mean in relationship to a schedule of values?

10:54:10 3 A. Well, what I mean is earned value. Each  
 10:54:17 4 contractor has a contractor value, and there is a  
 10:54:24 5 certain amount of time connected with his work. As  
 10:54:27 6 far as I'm concerned, when you compare the two, you  
 10:54:32 7 get an earned value. If he has progressed the work  
 10:54:36 8 against the schedule, that's a good thing, and it's  
 10:54:41 9 easy to approve his invoice.

10:54:48 10 Q. Okay. And if a contractor hasn't begun  
 10:54:52 11 work, is it appropriate for a construction manager to  
 10:54:54 12 authorize payment to that contractor?

10:54:59 13 A. If there is a mobilization payment due under  
 10:55:01 14 the terms of the contractor's contract.

10:55:02 15 Q. Okay.

10:55:08 16 A. It would be proper to approve whatever the  
 10:55:09 17 contract called for.

10:55:12 18 Q. All right. What if there is no mobilization  
 10:55:17 19 approved in the contract and there is no signed  
 10:55:20 20 schedule of values, is it appropriate for a  
 10:55:23 21 construction manager to authorize payment to a  
 10:55:27 22 contractor who has not yet begun work under those  
 10:55:28 23 circumstances?

10:55:30 24 MR. WALKER: Object to the use of the term  
 10:55:32 25 "authorize" as being vague.

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15 (Pages 57 to 60)

10:55:35 1 Q. (BY MR. TROUT) Well, you know what the term  
 10:55:38 2 authorized means, don't you, sir?  
 10:55:41 3 MR. WALKER: Also object on the basis of lack of  
 10:55:41 4 foundation.  
 10:55:44 5 THE WITNESS: Well, yes. I know what the term  
 10:55:47 6 authorize means. It means go ahead.  
 10:55:48 7 MR. TROUT: That's right. So I'm going to have  
 10:56:14 8 the court reporter read back my question, please.  
 10:56:14 9 (The question was read back.)  
 10:56:17 10 MR. WALKER: Objection. Vague and lack of  
 10:56:17 11 foundation.  
 10:56:27 12 THE WITNESS: If the contractor's work not having  
 10:56:34 13 been started jeopardizes the overall schedule, it may  
 10:56:40 14 be less expensive to authorize some payment to get him  
 10:56:47 15 started than it would be to let the project be further  
 10:56:49 16 delayed.  
 10:56:50 17 Q. (BY MR. TROUT) And how is that --  
 10:56:53 18 A. Schedule is everything in a construction  
 10:56:53 19 project.  
 10:57:12 20 Q. I understand. So as a construction manager,  
 10:57:18 21 how much are you going to authorize for payment where  
 10:57:21 22 no work is being performed?  
 10:57:22 23 A. I can't answer that, because I don't know  
 10:57:27 24 how critical it might be to push the contractor to  
 10:57:28 25 start.

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10:57:31 1 Q. What if you're paying him and he doesn't  
 10:57:32 2 start at all?  
 10:57:35 3 A. Well, you -- in the worst case, you can  
 10:57:43 4 breach his contract and go out and hire another one.  
 10:57:43 5 Q. Well --  
 10:57:46 6 A. There is a lot of what ifs.  
 10:57:48 7 Q. Okay. That's fair.  
 10:58:03 8 As a construction manager, if you have the  
 10:58:07 9 responsibility for certifying that a portion of the  
 10:58:12 10 work has been done prior to authorizing payment, what  
 10:58:16 11 steps do you undertake to do so?  
 10:58:21 12 A. Well, I would go to the client and explain  
 10:58:30 13 to the client why I was proposing to pay somebody for  
 10:58:35 14 work that hadn't been physically performed and my  
 10:58:36 15 reasons for wanting to do it.  
 10:58:39 16 Q. Would you document that in any fashion?  
 10:58:39 17 A. Certainly I would.  
 10:58:41 18 Q. How would you document it?  
 10:58:44 19 A. Well, I would go have a meeting with them,  
 10:58:47 20 and then I'd write the minutes of the meeting. And if  
 10:58:51 21 I had a client that I didn't trust, I'd have them sign  
 10:58:54 22 the minutes along with my signature.  
 10:59:07 23 Q. Okay. Is it your opinion that a  
 10:59:14 24 construction manager exercising ordinary care in the  
 10:59:17 25 state of Idaho at the time of the Meridian City Hall

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10:59:32 1 project would document any significant decision made  
 10:59:33 2 by a client.  
 10:59:35 3 MR. WALKER: Object to the use of the term  
 10:59:36 4 "significant" as being vague.  
 10:59:39 5 THE WITNESS: I would think that the client would  
 10:59:45 6 want a documentation as well as the contractor.  
 10:59:45 7 MR. TROUT: Okay.  
 10:59:48 8 Q. (BY MR. TROUT) So let me ask the question  
 10:59:53 9 one more time so that we can get a very clear answer  
 10:59:55 10 to the specific question if we can, sir.  
 11:00:01 11 In your opinion as a construction manager  
 11:00:10 12 for the period of time of the Meridian City Hall  
 11:00:14 13 project, would a construction manager in the exercise  
 11:00:21 14 of ordinary care document any significant decision  
 11:00:23 15 made by a client?  
 11:00:26 16 MR. WALKER: Object to the word "significant" as  
 11:00:27 17 being vague.  
 11:00:33 18 THE WITNESS: Well, I think I need a more defined  
 11:00:38 19 definition of what significant is.  
 11:00:39 20 MR. TROUT: Okay.  
 11:00:43 21 Q. (BY MR. TROUT) So you can't answer without  
 11:00:47 22 that definition?  
 11:00:50 23 A. I can't feel as comfortable answering as if  
 11:01:00 24 I had a definition. As an example, in a very tiny job  
 11:01:06 25 with a very tiny issue, I might just go ahead and do

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11:01:13 1 something, on a very big job with a tiny issue, it all  
 11:01:16 2 depends on the context in which it is in.  
 11:01:18 3 Q. All right. So in the context of a project  
 11:01:22 4 like the Meridian City Hall project, if the decision  
 11:01:27 5 involved a value of more than \$500, should that be  
 11:01:28 6 documented?  
 11:01:29 7 A. I would think so.  
 11:01:33 8 Q. All right. And would your answer be the  
 11:01:36 9 same if the decision involved a value of more than  
 11:01:38 10 \$5,000?  
 11:01:38 11 A. Yes.  
 11:02:16 12 Q. Okay. You have issued a written report in  
 11:02:17 13 this case; is that correct?  
 11:02:17 14 A. That's correct.  
 11:02:31 15 (Deposition Exhibit No. 91 marked.)  
 11:02:47 16 Q. (BY MR. TROUT) Sir, the court reporter has  
 11:02:55 17 handed you a copy of Exhibit No. 91, which I  
 11:02:59 18 understand to be your report; is that correct?  
 11:02:59 19 A. That's correct.  
 11:03:09 20 Q. Now, is this document the opinions of Lemley  
 11:03:10 21 International?  
 11:03:11 22 A. Yes.  
 11:03:19 23 Q. All right. And let me make sure I  
 11:03:23 24 understand, Lemley International is a corporation?  
 11:03:23 25 A. Yes.

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16 (Pages 61 to 64)

11:03:27 1 Q. Okay. Organized under the laws of what  
 11:03:28 2 state?  
 11:03:29 3 A. The State of Idaho.  
 11:03:33 4 Q. Okay. When did Lemley International come  
 11:03:34 5 into existence?  
 11:03:35 6 A. 1988.  
 11:03:39 7 Q. All right. And who are the shareholders?  
 11:03:41 8 A. My wife and I.  
 11:03:44 9 Q. Based upon your -- are there any other  
 11:03:45 10 shareholders?  
 11:03:45 11 A. No.  
 11:03:54 12 Q. Based upon the -- and I may not ask this  
 11:03:58 13 correctly, so please correct me if I'm wrong.  
 11:03:58 14 A. I'll try.  
 11:04:01 15 Q. Would you consider yourself to be the  
 11:04:03 16 principal of Lemley International?  
 11:04:06 17 A. On all technical matters, yes.  
 11:04:09 18 Q. All right. On financial matters, would I be  
 11:04:11 19 correct in understanding from your prior testimony  
 11:04:15 20 that your wife is the principal?  
 11:04:15 21 A. Yes.  
 11:04:18 22 Q. And your wife's name, sir?  
 11:04:20 23 A. Pamela K. Lemley.  
 11:04:32 24 Q. All right. Would I be correct in  
 11:04:36 25 understanding that this report is not intended to

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11:04:39 1 provide any legal opinions of any kind?  
 11:04:40 2 A. That is correct.  
 11:04:53 3 Q. All right. If I came to you as a  
 11:05:00 4 construction manager, and I'm the client, and I ask  
 11:05:13 5 you to give me a conceptual design that would result  
 11:05:24 6 in my having 20,000 square feet of useable office  
 11:05:28 7 space, how many square feet would the building have to  
 11:05:29 8 be?  
 11:05:34 9 A. Well, the building would have to be whatever  
 11:05:44 10 size a building you had planned to plant on top of the  
 11:05:47 11 foundation.  
 11:05:53 12 Q. Well, let's get specific. If I want 20,000  
 11:05:58 13 square feet of useable office space, how much larger  
 11:06:00 14 does the building have to be?  
 11:06:03 15 MR. WALKER: Object to the use of the term --  
 11:06:05 16 THE WITNESS: It doesn't have to be.  
 11:06:07 17 MR. WALKER: Just a second -- of useable office  
 11:06:15 18 space as being vague.  
 11:06:19 19 THE WITNESS: Well, built to what standard, and  
 11:06:27 20 above ground, below ground, in Idaho, in Wisconsin, or  
 11:06:29 21 in the winter or the summer?  
 11:06:30 22 MR. TROUT: I'll narrow it down.  
 11:06:47 23 Q. (BY MR. TROUT) In Idaho, Class A to be  
 11:06:57 24 constructed commencing in May of any given year, if I  
 11:07:05 25 seek 20,000 square feet of useable office space, how

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11:07:08 1 large does the structure have to be?  
 11:07:10 2 MR. WALKER: Object to the use of the term  
 11:07:11 3 useable as being vague.  
 11:07:14 4 THE WITNESS: The structure has to be at least  
 11:07:21 5 20,000 square feet on the inside, so you'd have to  
 11:07:29 6 have the dimension of the walls and add that to the  
 11:07:40 7 floor area, and at the time the Meridian City Hall was  
 11:07:45 8 constructed, probably it would cost you about 130 to  
 11:07:47 9 150 dollars a square foot.  
 11:07:51 10 MR. TROUT: Well, I'm not talking about cost for  
 11:07:55 11 the moment. We haven't gotten to that subject matter.  
 11:07:56 12 THE WITNESS: Okay. Excuse me.  
 11:07:59 13 Q. (BY MR. TROUT) Okay. In your report you  
 11:08:02 14 talk about efficiency ratios; correct?  
 11:08:03 15 A. Yes.  
 11:08:09 16 Q. What's an efficiency ratio?  
 11:08:12 17 A. Well, of the amount of space contained  
 11:08:15 18 within the shell of the building, it's how much of the  
 11:08:20 19 building itself can be used for its intended purpose.  
 11:08:26 20 Q. Okay. If I want 20,000 square feet of  
 11:08:34 21 useable office space, what kind of efficiency ratio  
 11:08:40 22 would you consider to be applicable for a Class A  
 11:08:43 23 office building to be constructed in the year  
 11:08:51 24 2006/2007 in Meridian, Idaho?  
 11:08:53 25 MR. WALKER: Objection. Lack of foundation, and

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11:08:56 1 also vague as to the term "useable."  
 11:09:00 2 THE WITNESS: Are there any interior  
 11:09:04 3 accouterments that go with a shell?  
 11:09:08 4 Q. (BY MR. TROUT) Just 20,000 square feet of  
 11:09:09 5 useable office space.  
 11:09:10 6 MR. WALKER: Same objection.  
 11:09:19 7 THE WITNESS: It would be probably efficient to  
 11:09:21 8 the 85 or 90 percent level.  
 11:09:22 9 MR. TROUT: Okay.  
 11:09:24 10 Q. (BY MR. TROUT) So would I be correct in  
 11:09:29 11 understanding that a 15 percent efficiency ratio would  
 11:09:32 12 be applicable?  
 11:09:36 13 A. I think it would be very much higher than  
 11:09:41 14 that if you are just building a box that is 20,000  
 11:09:44 15 square feet with nothing to the box, all you have is a  
 11:09:51 16 door, and the door has to have an area to swing in,  
 11:09:54 17 either in or out.  
 11:10:06 18 Q. Okay. So your concept of Class A office  
 11:10:14 19 space for 2006 is simply a box with a door; is that  
 11:10:16 20 correct?  
 11:10:18 21 A. Well, I thought that's what you indicated.  
 11:10:22 22 Q. No. I'm asking you what you believe to be  
 11:10:30 23 Class A office space in the year 2006 in the City of  
 11:10:35 24 Meridian, Idaho? Is it just a box with a door.  
 11:10:36 25 MR. WALKER: Objection. Lack of foundation.

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17 (Pages 65 to 68)

11:10:38	1	Q. (BY MR. TROUT) What is it?	11:14:13	1	(The question was read back.)
11:10:41	2	A. I believe -- I'll give you an example of a	11:14:19	2	MR. TROUT: Would you answer that question, sir?
11:10:44	3	building that I think is representative of that and	11:14:26	3	THE WITNESS: I might have a feeling about it,
11:10:48	4	that would be the Banner Bank building.	11:14:31	4	but if I was told that I was going to build something
11:10:53	5	Q. Okay. And what kind of -- first of all, how	11:14:37	5	that was 80,000 square feet, I would presume that the
11:10:58	6	many square feet of useable office space exists in the	11:14:41	6	architect and the owner knew what it was they were
11:10:59	7	Banner Bank building?	11:14:45	7	putting in the contract. And in this case, there was
11:10:59	8	A. I don't know.	11:14:52	8	an 80,000 square foot building described in the
11:11:02	9	Q. Do you know what the efficiency ratio is for	11:14:58	9	contract, and there was an architect on board, it
11:11:04	10	the Banner Bank building?	11:15:03	10	wouldn't have been a long stretch for me to assume
11:11:05	11	A. No, I don't.	11:15:06	11	that both the owner and the architect knew what the
11:11:14	12	Q. Okay. Does it typically take more than one	11:15:09	12	hell they were doing.
11:11:19	13	square foot of building construction to accommodate	11:15:09	13	MR. TROUT: Okay.
11:11:24	14	one square foot of Class A useable office space?	11:15:13	14	Q. (BY MR. TROUT) So let's turn to your
11:11:25	15	MR. WALKER: Objection. Lack of foundation.	11:15:13	15	report.
11:11:29	16	Vague as to the term "typical."	11:15:17	16	A. Uh-huh. Yes, sir.
11:11:33	17	THE WITNESS: Well, if you're asking, do you have	11:15:22	17	Q. This is Exhibit No. 91.
11:11:37	18	to build more than you plan on using -- is that your	11:15:23	18	A. Yes, sir.
11:11:43	19	question?	11:15:32	19	Q. All right. And in Exhibit No. 91, at page 1
11:11:44	20	MR. TROUT: Well, it is certainly part of the	11:15:43	20	of 12 --
11:11:45	21	question.	11:15:45	21	A. 1 of 12?
11:11:48	22	THE WITNESS: Well, I would say you'd have to	11:15:48	22	Q. Can you find that?
11:11:52	23	build more space than what your bare minimum	11:15:49	23	A. I haven't yet.
11:11:53	24	requirements would be.	11:15:51	24	Q. Okay.
11:11:56	25	Q. (BY MR. TROUT) Okay. How much more?	11:15:56	25	A. Okay. I'm there.
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11:11:58	1	MR. WALKER: Objection. Lack of foundation.	11:16:04	1	Q. You provide in your report a specific quote
11:12:00	2	THE WITNESS: It would depend on what the	11:16:11	2	from the Petra/City of Meridian contract; is that
11:12:01	3	building was going to be used for.	11:16:12	3	correct?
11:12:06	4	Q. (BY MR. TROUT) All right. A Class A office	11:16:12	4	A. Yes, I did.
11:12:10	5	space used for the Meridian City Hall.	11:16:22	5	Q. And it says, approximately, "80,000 square
11:12:14	6	A. It would require significantly more space	11:16:29	6	feet of standard Class A office space,".
11:12:20	7	because it is a public building. It needs lobbies,	11:16:31	7	Did I read that correctly?
11:12:30	8	wider halls. It needs a city council chamber and a	11:16:31	8	A. Yes.
11:12:40	9	variety of offices that will accommodate the City of	11:16:36	9	Q. And that's the description that was provided
11:12:40	10	Meridian.	11:16:41	10	in the contract for this project; is that correct?
11:12:42	11	Q. All right, sir. And based upon your	11:16:44	11	A. Well, you stop, I think, a little early
11:12:45	12	experience as a construction manager and with a	11:16:52	12	here. It says, "and related improvements with surface
11:12:48	13	reasonable degree of professional certainty would it	11:16:53	13	parking for the project."
11:12:53	14	be your opinion that any construction manager looking	11:16:55	14	Q. Okay. But that's the description that was
11:12:58	15	at the construction of 80,000 square feet of useable	11:17:02	15	provided in the Petra/Meridian project was for 80,000
11:13:03	16	office space knew or should have known that it would	11:17:08	16	square feet of standard Class A office space?
11:13:06	17	require more square footage than just the 80,000	11:17:09	17	A. Yes.
11:13:09	18	square feet?	11:17:40	18	Q. All right. Now, when we turn to page 4 of
11:13:19	19	A. That's a hypothetical again, and the	11:17:43	19	12, if you would --
11:13:26	20	construction manager would have to know to what extent	11:17:43	20	A. Yes, sir.
11:13:33	21	the building was going to be upgraded in terms of	11:18:00	21	Q. -- in the second full paragraph, you
11:13:39	22	quality on the interior, how it is heated and cooled,	11:18:08	22	indicate that if someone wanted 60,000 -- or excuse
11:14:12	23	and all of the various aspects of the building.	11:18:14	23	me -- 67,000 square feet of tenant space, or useable
11:14:13	24	MR. TROUT: Would you read the question back,	11:18:21	24	space, that an efficiency ratio of 84 percent is
11:14:13	25	please?	11:18:23	25	ambitious; is that correct?
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11:18:23 1 A. Yes.  
 11:18:27 2 Q. What is a more reasonable efficiency ratio  
 11:18:34 3 for a project like the Meridian City Hall in the year  
 11:18:44 4 2006/2007 than the 84 percent you have stated? Is it  
 11:18:48 5 a lower percentage or a higher percentage?  
 11:18:50 6 A. It's a lower percentage as I understand it,  
 11:18:57 7 although, architects are generally tasked with  
 11:19:06 8 calculating useable floor space as they design a  
 11:19:14 9 building. That relates more to an architectural  
 11:19:17 10 expert than to a construction manager.  
 11:19:20 11 Q. Okay. So are you telling me that you don't  
 11:19:24 12 have the expertise to express the opinion that is  
 11:19:27 13 contained in the second full paragraph on page 4 of  
 11:19:28 14 12?  
 11:19:34 15 A. I'm telling you that we did not do an  
 11:19:40 16 extensive calculation to calculate these numbers.  
 11:19:43 17 Instead, we used the information that came from the  
 11:19:52 18 people that we worked with, and I would say that our  
 11:20:06 19 experience on the capitol is that the efficiency there  
 11:20:16 20 can't be any greater than about 85 to 90 percent as  
 11:20:22 21 opposed to the two wings, which we believe are  
 11:20:26 22 significantly more efficient.  
 11:20:30 23 Q. Well, that wasn't really my question, so  
 11:20:31 24 we'll go back.  
 11:20:33 25 A. Well, I understand that. I thought I

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11:20:37 1 answered it with two or three paragraphs. I'm sorry,  
 11:20:38 2 sir.  
 11:20:41 3 Q. That's all right. You don't need to  
 11:20:46 4 apologize. I just want to get a specific answer to my  
 11:20:51 5 specific question. My specific question is: Would I  
 11:20:55 6 be correct in understanding from your testimony that  
 11:21:00 7 you don't have the professional competence to express  
 11:21:05 8 an opinion about what's ambitious or not ambitious in  
 11:21:08 9 terms of building efficiency ratios that is contained  
 11:21:14 10 in paragraph -- second full paragraph, page 4 of 12 of  
 11:21:18 11 Exhibit No. 91, your report?  
 11:21:22 12 A. What I think I testified to was the fact  
 11:21:27 13 that we do have the professional experience and  
 11:21:31 14 competence to do those calculations, but in this  
 11:21:37 15 particular case, we did not calculate that as we felt  
 11:21:42 16 that was information more readily gained from the  
 11:21:42 17 architect.  
 11:21:48 18 Q. All right. And if Lombard-Conrad testified  
 11:21:58 19 that an efficiency ratio of 75 percent was appropriate  
 11:22:03 20 for the construction of the City Hall in Meridian,  
 11:22:10 21 Idaho, in the years 2006/2007, would you have any  
 11:22:14 22 professional reason to disagree with that?  
 11:22:23 23 A. We would be cautious about it. There have  
 11:22:27 24 been numbers floating around in the 73 to the 75  
 11:22:33 25 percent range, but we would definitely calculate it if

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11:22:38 1 it seemed to be something that came to bear on whether  
 11:22:41 2 or not the construction manager performed his services  
 11:22:42 3 correctly.  
 11:22:46 4 Q. Okay. And you haven't made any such  
 11:22:48 5 calculation in this case; correct?  
 11:22:48 6 A. That's correct.  
 11:23:04 7 Q. All right. Turning your attention for a  
 11:23:11 8 moment away from Exhibit No. 91 and to Exhibit No. 2  
 11:23:15 9 in the binder in front of you.  
 11:23:15 10 A. Yes, sir.  
 11:23:18 11 Q. Exhibit No. 2 is the Construction Management  
 11:23:24 12 Agreement that was signed by the City of Meridian and  
 11:23:25 13 Petra.  
 11:23:26 14 Do you understand that to be correct?  
 11:23:27 15 A. Yes, I do.  
 11:23:32 16 Q. Okay.  
 11:23:37 17 A. Can you specifically tell me where it is at?  
 11:23:41 18 Right there. There it is. Okay. I have it front of  
 11:23:41 19 me.  
 11:23:43 20 MR. WALKER: You want Exhibit No. 2?  
 11:23:43 21 MR. TROUT: Well -- no. Hold on. Please sit  
 11:23:43 22 down. We'll let the witness answer.  
 11:23:49 23 Q. (BY MR. TROUT) Would you please read what  
 11:23:51 24 exhibit you are referring to when you say you have  
 11:23:53 25 Exhibit 2 in front of you?

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11:23:59 1 A. Well, I have in front of me a deposition  
 11:24:02 2 given by Mr. Bennett.  
 11:24:12 3 Q. Okay. And if you turn to the next tab, what  
 11:24:15 4 do you have in front of you?  
 11:24:19 5 A. I have the contract between Petra and the  
 11:24:20 6 City of Meridian.  
 11:24:25 7 Q. Okay. I'm referring to the contract between  
 11:24:28 8 the City of Meridian and Petra.  
 11:24:28 9 A. Okay.  
 11:24:32 10 Q. And I have a specific question for you.  
 11:24:34 11 A. Yes.  
 11:24:42 12 Q. Can you point out for me what language of  
 11:24:50 13 that contract Petra was free to disregard?  
 11:24:56 14 A. I don't believe they were free to disregard  
 11:24:57 15 any of it.  
 11:25:00 16 Q. And in the expressions of your opinions in  
 11:25:03 17 this case are you free to disregard any of the  
 11:25:06 18 language of the contract between City of Meridian and  
 11:25:07 19 Petra?  
 11:25:07 20 A. No.  
 11:25:10 21 MR. TROUT: All right. Let's take ourselves  
 11:25:12 22 about a five-minute break.  
 11:35:20 23 (Recess taken at 11:25 a.m. to 11:35 a.m.)  
 11:35:47 24 MR. TROUT: Back on the record in the deposition  
 11:35:51 25 of Mr. Lemley.

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11:35:54 1 Q. (BY MR. TROUT) Mr. Lemley, again, referring  
 11:35:58 2 you to Exhibit No. 91, which is your report.  
 11:35:58 3 A. Yes, sir.  
 11:36:08 4 Q. How was this document created?  
 11:36:18 5 A. It was created over a period of time. Our  
 11:36:21 6 usual practice in the office is to come up with an  
 11:36:30 7 outline and then flush the outline out, and  
 11:36:33 8 particularly as I make comments on various aspects of  
 11:36:40 9 it, they are corrected on the computer so that when we  
 11:36:46 10 finish we've got one report that is our report.  
 11:36:51 11 Q. Well, let me ask you this: Starting with  
 11:36:57 12 page 1 of 12 --  
 11:36:58 13 A. Yes.  
 11:37:01 14 Q. -- which member of your staff actually  
 11:37:04 15 prepared this document?  
 11:37:09 16 A. Mr. Bauer had as much as to do with it as  
 11:37:10 17 anyone other than myself.  
 11:37:19 18 Q. So if I were to look at the metadata for the  
 11:37:22 19 word processing program that created this report, I  
 11:37:26 20 would find that Mr. Bauer was the author; is that  
 11:37:27 21 correct?  
 11:37:33 22 A. Well, no. I think you would find that as I  
 11:37:40 23 gave him corrections, he'd go back and correct it, and  
 11:37:45 24 as far as I'm concerned, I think the substance of the  
 11:37:51 25 report is my report. I didn't type all of it, but

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11:39:37 1 have one other issue that I'd like to go back to. I  
 11:39:45 2 need to correct my agreement to give you the Boston  
 11:39:51 3 audit. I do have a confidentiality agreement with the  
 11:39:54 4 State of Massachusetts on that.  
 11:39:55 5 Q. Okay.  
 11:39:59 6 A. So I don't think I can release that.  
 11:40:03 7 Q. All right. Would you provide us with a copy  
 11:40:05 8 of that confidential agreement?  
 11:40:05 9 A. Sure.  
 11:40:15 10 Q. Okay. And if we ask the court to review  
 11:40:20 11 whether or not it could be disclosed strictly within  
 11:40:23 12 the confines of this litigation, would you be okay  
 11:40:24 13 with that?  
 11:40:26 14 A. I don't have any problem with anybody  
 11:40:35 15 reading it, and a lot of time has passed since we did  
 11:40:43 16 that, and Bechtel has finally paid the state of  
 11:40:50 17 Massachusetts \$484 million for their mess.  
 11:40:52 18 Q. Well, that's good for the State of  
 11:40:53 19 Massachusetts; correct?  
 11:40:57 20 A. Yes. And most of it came on the strength of  
 11:40:59 21 my quality audit.  
 11:40:59 22 Q. Okay.  
 11:41:02 23 A. I thought they should have gotten 600  
 11:41:05 24 million but they settled for 484.  
 11:41:07 25 Q. Tell me what a quality audit is.

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11:37:52 1 it's --  
 11:37:54 2 Q. Okay. Which part did you type?  
 11:37:58 3 A. I didn't type any of it. I had a stroke  
 11:38:03 4 four years ago, and I lost the use of my left side of  
 11:38:09 5 my body. Now everything has come back with the  
 11:38:13 6 exception of my left hand, and I have no fine motor  
 11:38:17 7 skills with my left hand, so I have to hunt and peck  
 11:38:21 8 with my right hand, so that has limited my  
 11:38:21 9 participation in typing.  
 11:38:25 10 Q. So who did the typing?  
 11:38:30 11 A. Bauer did a lot of it. Randal Hartman did  
 11:38:30 12 some of it.  
 11:38:33 13 Q. And who is Mr. Hartman?  
 11:38:37 14 A. I explained, he was a financial fellow in  
 11:38:42 15 our firm who is in charge of billing and general  
 11:38:47 16 office administration.  
 11:38:56 17 Q. Okay. Do you have the various drafts or  
 11:39:04 18 iterations of this that were in existence prior to the  
 11:39:05 19 final report?  
 11:39:07 20 A. No. They just corrected the data that was  
 11:39:13 21 on the computer and lost the previous information.  
 11:39:20 22 Q. Okay. So if I ask you to provide me with  
 11:39:24 23 the original electronic file for the creation of this  
 11:39:28 24 report, would you do so?  
 11:39:32 25 A. I would with the advice of Counsel. And I

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11:41:14 1 A. Well, it's -- to audit something,  
 11:41:19 2 particularly that's been built in a public sector,  
 11:41:27 3 there are always records kept on a shift by shift  
 11:41:32 4 basis, so when I was asked to do this quality audit,  
 11:41:38 5 one of the slurry walls had failed, and it failed in a  
 11:41:47 6 position to give the whole I93 part of the project  
 11:41:57 7 very high visibility. It was adjacent to the federal  
 11:42:01 8 reserve building in Boston, and it blew all kinds of  
 11:42:09 9 soil into the roadway. It had to be shut down, so the  
 11:42:13 10 state appointed a special master to do a quality  
 11:42:14 11 audit, and he called me.  
 11:42:20 12 I was on the Board of Directors of Idaho  
 11:42:26 13 Power, and the administrative assistant to the CEO  
 11:42:30 14 came in with a note for me: Urgent. Call Judge  
 11:42:33 15 Ginsberg in Boston. So I went out and called him, and  
 11:42:37 16 he said I want you back here tomorrow to do a quality  
 11:42:42 17 audit on the Central Artery. I said, well, I'll see  
 11:42:48 18 what I can do. It's a little bit torturous to fly  
 11:42:50 19 from here to Boston.  
 11:42:53 20 Anyway, I did find a way to get there, and I  
 11:42:58 21 had in the meantime called a colleague of mine in New  
 11:43:04 22 York who is, I believe, the best foundation engineer  
 11:43:10 23 in North America, and I told him to meet me in Boston  
 11:43:12 24 the next morning.  
 11:43:17 25 So to do a quality audit, I decided to start

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20 (Pages 77 to 80)

11:43:23 1 with the paper that Bechtel's shift engineers had  
 11:43:28 2 filled out during their shift on the construction of  
 11:43:36 3 the slurry wall. So I got boxes and boxes of paper.  
 11:43:41 4 And I had taken four people from my office here back  
 11:43:45 5 there with me. And I said, now, the paper that looks  
 11:43:51 6 like the panel is okay, put it in this pile. And the  
 11:43:55 7 ones that you have questions about, put it in this  
 11:44:02 8 pile. And as this pile started to grow, I went to the  
 11:44:06 9 judge, and I told him that to do anymore, we would  
 11:44:10 10 have to have all of the architectural treatment on the  
 11:44:15 11 face of the slurry wall taken off on a number of  
 11:44:24 12 panels. They took it off, and you could see with a  
 11:44:27 13 visual inspection that there were serious problems  
 11:44:31 14 with the slurry wall.  
 11:44:38 15 So there were 200 elements that had to be  
 11:44:50 16 corrected to bring the walls up to the standard  
 11:44:58 17 specified. The Bechtel senior vice president asked me  
 11:45:02 18 what he could do, and I said, if I were you, I'd go  
 11:45:07 19 home tonight and pray that my warehouse burned down  
 11:45:09 20 with all that paper, because it is your paper that is  
 11:45:10 21 going to hang you.  
 11:45:17 22 Well, he evidently didn't pray or somebody  
 11:45:20 23 didn't listen to me, because the warehouse stood and  
 11:45:25 24 the more paper we got, the worse it got, so --  
 11:45:29 25 Q. So in the performance of a quality audit,

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11:45:33 1 what are the appropriate steps that a construction  
 11:45:38 2 manager or someone doing the forensic work should  
 11:45:42 3 follow to determine whether or not the work has been  
 11:45:44 4 done according to specification?  
 11:45:48 5 A. The first step is to gather all of the  
 11:45:58 6 contemporaneously created documents gathered up so  
 11:46:04 7 that you are not speculating about how things might  
 11:46:07 8 have been done, but you actually have the paper from  
 11:46:11 9 the people who did the work, or inspectors that were  
 11:46:15 10 there. And you start to exercise judgment on the  
 11:46:30 11 value of that paper and oftentimes it will give you  
 11:46:33 12 the exact aspect of the work you should look at.  
 11:46:36 13 Q. Would that be your opinion, sir, that the  
 11:46:39 14 documentation for the project is the best evidence  
 11:46:43 15 from which an audit should be reviewed?  
 11:46:48 16 A. Yes, unless it requires a physical  
 11:46:58 17 measurement of a specific structural element, and that  
 11:47:06 18 should -- to do that measurement, it should be -- a  
 11:47:10 19 coupon should be clipped out of whatever it is being  
 11:47:14 20 measured and subject it to laboratory tests.  
 11:47:27 21 Q. Okay. So just as an aside, when was the  
 11:47:36 22 last office building constructed that you were the  
 11:47:40 23 construction manager on?  
 11:47:44 24 A. The last building that serves partially as  
 11:47:51 25 an office building is the Water Center down at

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11:48:01 1 Broadway and Main. And we were an agent construction  
 11:48:02 2 manager on that.  
 11:48:05 3 Q. For what entity?  
 11:48:07 4 A. For the State of Idaho.  
 11:48:13 5 Q. All right. Did you specifically contract  
 11:48:18 6 with the University of Idaho?  
 11:48:20 7 A. Originally, yes, and then I believe it was  
 11:48:22 8 transferred to the Department of Public Works.  
 11:48:33 9 Q. Okay. How many square feet of useable  
 11:48:36 10 office space is there in the Water Center?  
 11:48:38 11 A. I can't tell you. I'll have to review the  
 11:48:38 12 records.  
 11:48:41 13 Q. Do you know what the total square footage of  
 11:48:43 14 the building is?  
 11:48:47 15 A. No. I'll get that, and we will send it to  
 11:48:47 16 you.  
 11:48:50 17 Q. Okay. That would be very kind of you.  
 11:48:50 18 Thank you.  
 11:48:54 19 Were you a construction manager at risk for  
 11:48:56 20 the Water Center project?  
 11:48:59 21 A. No. I think I said I was an agent  
 11:49:00 22 construction manager.  
 11:49:49 23 Q. All right. Turning your attention to page 6  
 11:49:51 24 of 12.  
 11:49:55 25 A. Yes, sir.

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11:49:59 1 Q. You have a section in the bottom of this  
 11:50:05 2 page that refers to a masonry contractor by the name  
 11:50:08 3 of TMC; correct?  
 11:50:08 4 A. Yes, sir.  
 11:50:15 5 Q. When did TMC begin its work on the Meridian  
 11:50:16 6 City Hall project?  
 11:50:16 7 A. November.  
 11:50:20 8 Q. Of what year?  
 11:50:22 9 A. I believe '07.  
 11:50:25 10 Q. All right. And where do I find that  
 11:50:29 11 reflected in this report?  
 11:50:33 12 A. I don't know that you do. I think it is  
 11:50:38 13 certainly in the record for the project, and if you  
 11:50:42 14 have difficulty finding it, I will dig it out.  
 11:50:51 15 Q. Okay. And do you remember the specific date  
 11:50:56 16 in November of '07 they began their work?  
 11:51:00 17 A. I don't remember, but I visited with  
 11:51:11 18 Mr. Bauer about it yesterday, and there are a lot of  
 11:51:18 19 dates and things in here that I've tried to keep in  
 11:51:24 20 mind, but I hope you'll understand that there is a lot  
 11:51:26 21 of detail to this.  
 11:51:29 22 Q. Okay. Well, let's start working on some of  
 11:51:39 23 those details, if we can. If you'll turn to page 1 of  
 11:51:47 24 12 in your report -- actually, I apologize. If you  
 11:51:54 25 will turn to the second page of your report, which is

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21 (Pages 81 to 84)



11:52:04 1 a Bates numbered page PETRA96939.  
 11:52:06 2 A. 96939?  
 11:52:10 3 Q. Yes, sir. It's the second page of Exhibit  
 11:52:13 4 No. 91. It is the cover letter.  
 11:52:24 5 A. I see. Excuse me. I guess that's why we  
 11:52:45 6 have Bates numbers. I'm there, sir.  
 11:52:55 7 Q. All right. So you indicate in this document  
 11:53:04 8 that you met with Jerry Frank, Gene Bennett, and Tom  
 11:53:05 9 Coughlin; is that correct?  
 11:53:05 10 A. That's correct.  
 11:53:09 11 Q. When did you meet with Mr. Frank?  
 11:53:13 12 A. I met with him the first time out at the  
 11:53:21 13 site, and the second time here about a month ago in my  
 11:53:21 14 office.  
 11:53:24 15 Q. Okay. Who was present during the first  
 11:53:26 16 meeting with Mr. Frank at the site?  
 11:53:27 17 A. Mr. Bauer.  
 11:53:31 18 Q. Okay. Was anyone else present?  
 11:53:32 19 A. Gene Bennett and Tom Coughlin.  
 11:53:34 20 Q. Was anyone else present?  
 11:53:35 21 A. No.  
 11:53:39 22 Q. All right. Did you keep any notes of that  
 11:53:39 23 meeting?  
 11:53:40 24 A. No.  
 11:53:43 25 Q. Did Mr. Bauer keep any notes of that

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11:55:29 1 commentary by you?  
 11:55:32 2 A. As I remember it, he just agreed with me.  
 11:55:38 3 It wasn't any real discussion about their frustration  
 11:55:39 4 with it.  
 11:55:41 5 Q. Okay. Are you assuming they were  
 11:55:44 6 frustrated?  
 11:55:49 7 A. Well, no. I wasn't assuming. I heard  
 11:55:56 8 Mr. Bennett and Mr. Coughlin talking about it and the  
 11:56:01 9 difficulty to balance their system because the  
 11:56:08 10 population of the building wasn't -- hadn't grown to  
 11:56:12 11 the extent that the design called for. And the body  
 11:56:19 12 heat from individuals affects the manner in which  
 11:56:21 13 those raised floors perform.  
 11:56:25 14 Q. Prior to the meeting, how did you learn that  
 11:56:33 15 there was a raised floor or a plenum floor system in  
 11:56:33 16 this structure?  
 11:56:33 17 A. I didn't.  
 11:56:36 18 Q. So you learned about that for the first time  
 11:56:38 19 at that meeting?  
 11:56:40 20 A. I learned about that at the meeting, yes. I  
 11:56:44 21 was a bit surprised but --  
 11:56:46 22 Q. Why were you surprised?  
 11:56:56 23 A. Because typically ventilation is overhead  
 11:57:00 24 ventilation in most of what is built in the valley  
 11:57:07 25 here. That's quite a new aspect of ventilating

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11:53:43 1 meeting?  
 11:53:45 2 A. He may have. I don't know.  
 11:53:49 3 Q. All right. Did you keep any recordings of  
 11:53:50 4 that meeting?  
 11:53:50 5 A. No, sir.  
 11:53:55 6 Q. Okay. I'm going to focus on conversations  
 11:54:00 7 with the specific individuals if I can. When did that  
 11:54:04 8 meeting occur, what date?  
 11:54:09 9 A. That was probably April of this year.  
 11:54:14 10 Q. All right, sir. And can you tell me  
 11:54:17 11 specifically what was said by Mr. Frank and what was  
 11:54:20 12 said by you during that meeting?  
 11:54:24 13 A. Well, I said that I thought the building was  
 11:54:33 14 a nice looking building, and that I was told that  
 11:54:41 15 there was a raised floor for ventilation in the  
 11:54:46 16 building, and I said I understand how difficult a  
 11:54:51 17 raised floor can be to get the ventilation and whatnot  
 11:54:55 18 balanced, because we had a raised floor in the water  
 11:55:00 19 center, and they are not commonly used in the Treasure  
 11:55:04 20 Valley, so the experience to balance the systems  
 11:55:11 21 doesn't really exist here as it should, and we had to  
 11:55:18 22 bring people in from Seattle to finally achieve a  
 11:55:20 23 proper balance in the Water Center.  
 11:55:22 24 Q. All right. And what, if anything, was said  
 11:55:28 25 to you by Mr. Frank to that response of that

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11:57:13 1 buildings, and I think most people have shied away  
 11:57:19 2 from it because it is new and it takes particular  
 11:57:21 3 experience to make it work.  
 11:57:27 4 Q. All right. And what, if anything, was said  
 11:57:32 5 to you by Mr. Bennett regarding this plenum floor  
 11:57:33 6 system?  
 11:57:36 7 A. Well, he said they had had a bit of a  
 11:57:45 8 problem with -- whatever the vendor was -- Pacific  
 11:57:45 9 West or whatever.  
 11:57:47 10 Q. And what was the problem?  
 11:57:51 11 A. That they had given them a bad benchmark,  
 11:57:56 12 and the floor had been installed to that benchmark,  
 11:58:00 13 and it was wrong. So they had to go back and adjust  
 11:58:00 14 that.  
 11:58:04 15 Q. Who had given who a bad benchmark?  
 11:58:08 16 A. Petra had given the vendor a bad benchmark.  
 11:58:12 17 Q. Okay. And so why was that considered to be  
 11:58:14 18 a problem with the vendor?  
 11:58:18 19 A. Well, the vendor had to change the  
 11:58:20 20 elevations of the floor.  
 11:58:24 21 Q. It wasn't the vendor's fault, was it?  
 11:58:24 22 A. No.  
 11:58:26 23 Q. Was it the City's fault?  
 11:58:29 24 A. No. It's one of those things that happens  
 11:58:34 25 on a project. It's -- everybody in the business knows

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22 (Pages 85 to 88)

11:58:41 1 about contingencies, and that would be a typical use  
 11:58:49 2 of a contingency. Agent construction managers don't  
 11:58:53 3 have financial risk in a project like that and nobody  
 11:59:00 4 is perfect. It's a -- all human beings make mistakes.  
 11:59:07 5 Q. Well, we'll come back to that. What you are  
 11:59:13 6 saying is that the City of Meridian contracted with  
 11:59:18 7 Petra and agreed to pay for Petra's mistakes; is that  
 11:59:19 8 correct?  
 11:59:24 9 A. Well, they agreed, assuming they had an  
 11:59:30 10 understanding of contracts, they agreed that there  
 11:59:39 11 would be certain things that nobody had foreseen that  
 11:59:44 12 would have to be taken care of, and that's what a  
 11:59:50 13 contingency is carried for in a contract, and the  
 11:59:55 14 Petra contract was no exception to that. They carried  
 11:59:57 15 a contingency.  
 12:00:05 16 Q. So is it your testimony that the Petra  
 12:00:09 17 contract with the City of Meridian had a contingency  
 12:00:11 18 in it?  
 12:00:11 19 A. Yes.  
 12:00:19 20 Q. Okay. I'm going to ask you to turn to  
 12:00:23 21 Exhibit No. 2, which is the Petra contract.  
 12:00:23 22 A. Yes, sir.  
 12:00:28 23 Q. Okay. And I'd like to you identify for me  
 12:00:34 24 where I can find the contingency agreement in this  
 12:00:37 25 contract.

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12:00:44 1 A. Well, I don't know that I can point it out  
 12:00:46 2 today but --  
 12:00:49 3 Q. Well, take your time. We have all the time  
 12:00:52 4 you need.  
 12:00:56 5 A. All contracts such as this have a  
 12:01:10 6 contingency built into them so that --  
 12:01:14 7 Q. Well, what I'm asking you, sir, is to point  
 12:01:16 8 to the specific language in Petra --  
 12:01:21 9 A. I'm reading it right now, sir. I'll address  
 12:01:23 10 this as soon as I find it.  
 12:01:51 11 Q. Okay.  
 12:01:54 12 MR. WALKER: When do you want to take our lunch  
 12:01:55 13 break?  
 12:03:23 14 MR. TROUT: Oh, probably in a half hour.  
 12:05:02 15 (Brief pause.)  
 12:05:05 16 MR. WALKER: Mr. Trout, in order to save time, I  
 12:05:10 17 can point the paragraph out that Mr. Lemley is having  
 12:05:12 18 difficulty finding.  
 12:05:15 19 MR. TROUT: Well, sir, I'm not going to allow you  
 12:05:16 20 to coach the witness, so I'm going to ask you to  
 12:05:19 21 refrain from any commentary. Mr. Lemley is your  
 12:05:21 22 expert. He should be able to tell us with his  
 12:05:22 23 expertise what document --  
 12:05:23 24 MR. WALKER: I'm going to object to your  
 12:05:27 25 commentary, Mr. Trout. If you don't want me to point

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12:05:31 1 it out, and you want to take all afternoon while he  
 12:05:34 2 finds it, that's fine with me.  
 12:05:36 3 MR. TROUT: Perfect. That's what we will do.  
 12:05:36 4 (Seventeen-minute pause.)  
 12:22:41 5 THE WITNESS: I don't find the clause.  
 12:22:42 6 MR. TROUT: All right, sir.  
 12:22:47 7 Q. (BY MR. TROUT) Now, can you tell me, sir,  
 12:22:53 8 what form of agreement was used between the City of  
 12:22:59 9 Meridian and the prime contractors on this project?  
 12:22:59 10 A. No, I can't.  
 12:23:10 11 Q. Okay. Do you know what a notice of  
 12:23:11 12 substantial completion is?  
 12:23:11 13 A. Yes.  
 12:23:15 14 Q. Would you tell me, sir, what that is?  
 12:23:20 15 A. When the contractor has basically performed  
 12:23:25 16 all of the work in the schedule of values and the work  
 12:23:29 17 called for in the design and specification is  
 12:23:36 18 completed, the contractor is generally given the  
 12:23:37 19 notice of completion.  
 12:23:44 20 Q. Is it a notice of completion or a notice of  
 12:23:45 21 substantial completion?  
 12:23:50 22 A. Notice of substantial completion. There is  
 12:23:58 23 always a warranty period connected with a project and  
 12:24:02 24 total completion would be when the warranty period is  
 12:24:03 25 exhausted.

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12:24:06 1 Q. All right. Is that your understanding of  
 12:24:12 2 the contract format that was utilized by the City of  
 12:24:15 3 Meridian with the prime contractors for the Meridian  
 12:24:17 4 City Hall project?  
 12:24:18 5 A. That's my understanding.  
 12:24:25 6 Q. Okay. Going back to your meeting at the  
 12:24:29 7 site of the Meridian City Hall with Mr. Frank and  
 12:24:34 8 Mr. Bennett and Mr. Coughlin. Do you recall anything  
 12:24:42 9 else that was said by Mr. Bennett regarding the plenum  
 12:24:44 10 floor system?  
 12:24:50 11 A. No, I don't. We just walked through the  
 12:24:57 12 building and looked at the council chambers and the  
 12:25:05 13 lobby to the building, and down each of the wings to  
 12:25:09 14 see how they had been built out.  
 12:25:13 15 Q. All right. What other inspection of the  
 12:25:21 16 building or facilities did you make, if any?  
 12:25:25 17 A. Well, I looked at the fit and finish of the  
 12:25:32 18 interior that was obvious, and the fit and finish  
 12:25:36 19 looked like it was a good job.  
 12:25:38 20 Q. All right. Other than your observations of  
 12:25:42 21 the fit and finish of the interior, what other  
 12:25:45 22 observations, if any, did you make during your visit  
 12:25:49 23 to the Meridian City Hall?  
 12:25:54 24 A. Well, I looked at quite a large parking lot  
 12:26:07 25 and a plaza area with a water feature in it.

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23 (Pages 89 to 92)

12:26:10 1 Q. And what, if any, observation did you make  
 12:26:12 2 with respect to the parking lot?  
 12:26:18 3 A. Well, it was a good sized parking lot, and  
 12:26:25 4 presumably would accommodate the traffic normally seen  
 12:26:26 5 at the City Hall.  
 12:26:29 6 Q. All right. Did you make any other  
 12:26:32 7 observations with respect to the parking lot?  
 12:26:33 8 A. No.  
 12:26:36 9 Q. Did you make any observations with respect  
 12:26:40 10 to the water features?  
 12:26:44 11 A. There was -- it was pointed out to me that  
 12:26:48 12 there was some difficulty in the water feature, and  
 12:26:53 13 that there was a leak issue that was being worked on,  
 12:26:56 14 but that wasn't being done under warranty.  
 12:27:01 15 Q. All right. And who pointed that out to you?  
 12:27:01 16 A. Mr. Bennett.  
 12:27:04 17 Q. All right. And what specifically do you  
 12:27:09 18 recall Mr. Bennett saying to you about the water  
 12:27:10 19 features?  
 12:27:15 20 A. I think we just walked by it and in general  
 12:27:20 21 observation I said that it was attractive and that I  
 12:27:24 22 thought it went with the building very well, so the  
 12:27:29 23 architect was to be complemented, and his response was  
 12:27:38 24 to advise me of the leaks that seemed to be present in  
 12:27:39 25 the water feature.

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12:29:36 1 were getting started, they had encountered hazardous  
 12:29:42 2 and unsuitable material when they were excavating for  
 12:29:50 3 the garage, and that the site investigation that they  
 12:29:57 4 had -- that they did suggested that they raise the  
 12:30:05 5 building four feet so that it wouldn't puncture the  
 12:30:11 6 impervious layer and allow anything to migrate into  
 12:30:13 7 the ground water system.  
 12:30:24 8 Q. Okay. Can you tell me what a building story  
 12:30:26 9 is?  
 12:30:33 10 A. A building story is each useable level of  
 12:30:35 11 the building that would be a story.  
 12:30:48 12 Q. All right. Was anything else said by  
 12:30:54 13 Mr. Coughlin during your site visit in April?  
 12:30:58 14 A. There might have been some discussion of the  
 12:31:09 15 masonry work on the greater building being later than  
 12:31:15 16 they had hoped to have it done, but I don't remember  
 12:31:17 17 the specifics of the conversation.  
 12:31:20 18 Q. Did you make any personal observations of  
 12:31:26 19 the masonry work?  
 12:31:36 20 A. I said the masonry work from a general  
 12:31:41 21 visual standpoint looked pretty good, but I advised  
 12:31:51 22 them to measure the masonry installation to be sure  
 12:31:54 23 that it was done exactly according to specifications  
 12:31:55 24 and plans.  
 12:31:59 25 Q. Do you know if that measurement has taken

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12:27:49 1 Q. All right. In your visit, did you make any  
 12:27:52 2 other observations with respect to the water features  
 12:27:57 3 as constructed?  
 12:27:57 4 A. No, I didn't.  
 12:28:04 5 Q. All right. What, if anything, else was said  
 12:28:10 6 to you during that visit by Mr. Frank?  
 12:28:16 7 A. I don't recall any other subject being  
 12:28:18 8 addressed between us.  
 12:28:25 9 Q. What was Mr. Frank's role in the Meridian  
 12:28:27 10 City Hall project?  
 12:28:32 11 A. He was the executive of Petra, so he would  
 12:28:39 12 have had a general oversight responsibility for the  
 12:28:43 13 entire work being done by Petra.  
 12:28:45 14 Q. All right. Would you consider Mr. Frank to  
 12:28:47 15 be the principal in Petra?  
 12:28:48 16 A. Yes.  
 12:28:51 17 Q. Who was the project manager for the project?  
 12:28:52 18 A. Mr. Bennett.  
 12:28:56 19 Q. All right. What was Mr. Coughlin's role?  
 12:28:59 20 A. Well, Mr. Coughlin was the project manager.  
 12:29:03 21 Mr. Bennett was a home office oversight to  
 12:29:04 22 Mr. Coughlin.  
 12:29:13 23 Q. Okay. What, if anything, else do you recall  
 12:29:24 24 being said by Mr. Coughlin during that visit?  
 12:29:29 25 A. I think he explained to me that when they

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12:31:59 1 place?  
 12:32:00 2 A. I do not.  
 12:32:04 3 Q. All right. Do you recall anything else said  
 12:32:11 4 by Mr. Frank, Mr. Bennett, or Mr. Coughlin during that  
 12:32:12 5 visit?  
 12:32:15 6 A. Not that I can recall.  
 12:32:19 7 Q. All right. Tell me what, if anything, was  
 12:32:23 8 said by Mr. Bauer during that visit?  
 12:32:27 9 A. I think he probably mentioned the raised  
 12:32:33 10 floor as we were walking through the lobby, and that  
 12:32:36 11 opened that discussion, but I don't remember him  
 12:32:41 12 making any other significant observations.  
 12:32:46 13 Q. All right. Did you travel to the site with  
 12:32:47 14 Mr. Bauer?  
 12:32:47 15 A. I did.  
 12:32:50 16 Q. Did you travel away from the site with  
 12:32:51 17 Mr. Bauer?  
 12:32:51 18 A. I did.  
 12:32:54 19 Q. What, if any, conversation did you have with  
 12:32:58 20 Mr. Bauer regarding the site visit as you were  
 12:33:00 21 traveling away from the site?  
 12:33:07 22 A. I said that I thought the building looked  
 12:33:18 23 good for a new facility in the range of \$20 million.  
 12:33:24 24 My conclusion was that the City got value for the  
 12:33:26 25 money that they had spent on the building.

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24 (Pages 93 to 96)

12:33:30 1 Q. All right. Any other discussion by yourself  
 12:33:34 2 or Mr. Bauer during that particular travel?  
 12:33:37 3 A. I have no recollection of any other  
 12:33:37 4 discussion.  
 12:33:53 5 Q. All right. During the construction of the  
 12:34:02 6 Water Center, was the plenum floor in the Water Center  
 12:34:03 7 air tested?  
 12:34:04 8 A. Oh, yes. It was.  
 12:34:09 9 Q. All right. Are you familiar either from  
 12:34:14 10 your work at the Water Center -- actually, I'll ask it  
 12:34:17 11 in a slightly different way. Prior to your work on  
 12:34:21 12 the Water Center, had you been involved in any project  
 12:34:26 13 utilizing any installation of a plenum floor?  
 12:34:27 14 A. No.  
 12:34:32 15 Q. As a result of your work with the Water  
 12:34:38 16 Center and the installation of the plenum floor in  
 12:34:41 17 that facility, did you become familiar with air  
 12:34:45 18 testing for plenum floors.  
 12:34:49 19 A. Not very -- not to any detailed extent.  
 12:34:53 20 Q. Okay. Tell me what level of familiarity you  
 12:34:59 21 have with air testing of plenum floors?  
 12:35:02 22 A. Well, they are sensitive to the population  
 12:35:11 23 of the building because of the body heat that you are  
 12:35:15 24 introducing both in terms of heating and cooling, and  
 12:35:24 25 of course, the distribution of the air, it's -- it is

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12:35:31 1 a completely different way of ventilating a building  
 12:35:36 2 as opposed to historic standards, so people are not  
 12:35:43 3 used to having hot or cold air blow up from beneath  
 12:35:47 4 them. They are more used to it being over head, so I  
 12:35:53 5 think some of the balancing issues are related to  
 12:36:00 6 educating the occupants of the building to a new  
 12:36:05 7 system. And to my knowledge, the system has worked  
 12:36:08 8 very nicely for the last several years.  
 12:36:10 9 Q. At the Water Center?  
 12:36:10 10 A. Yes.  
 12:36:14 11 Q. All right. Now, how much destructive  
 12:36:20 12 testing occurred when the air testing for the plenum  
 12:36:25 13 floors was done on the Water Center?  
 12:36:27 14 A. There was -- a significant amount of the  
 12:36:34 15 floor was picked up and work changed around. I don't  
 12:36:37 16 think there was anything really destroyed or brought  
 12:36:40 17 in new. They rearranged certain things.  
 12:36:43 18 Q. Was any of the floor damaged in that  
 12:36:44 19 process?  
 12:36:44 20 A. No.  
 12:36:47 21 Q. All right. Would it be your experience as a  
 12:36:54 22 construction manager having worked on the plenum floor  
 12:36:58 23 system at the Water Center that it would not be  
 12:37:04 24 appropriate to damage the plenum floor components in  
 12:37:07 25 the testing process?

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12:37:10 1 A. It's never a good practice to damage any of  
 12:37:19 2 the permanent work during a testing phase. That's a  
 12:37:23 3 complete waste to damage permanent work, unless you  
 12:37:27 4 need to take a piece of it for deeper inspection.  
 12:37:32 5 Q. Some kind of destructive testing?  
 12:37:37 6 A. Yes. If you needed to take a piece of it  
 12:37:41 7 for destructive testing, that would be acceptable, but  
 12:37:46 8 it would be surprising to me to have much of a raised  
 12:37:52 9 floor have to be subjected to destructive testing if  
 12:37:57 10 you had received certifications from the manufacturer  
 12:37:59 11 and the vendor who had installed it.  
 12:38:03 12 Q. All right. In the form of shop drawings or  
 12:38:07 13 submittals, would that be the certification you are  
 12:38:08 14 talking about?  
 12:38:09 15 A. That's one component.  
 12:38:12 16 Q. Okay. What would be another component?  
 12:38:16 17 A. A certification that they were manufactured  
 12:38:20 18 in accordance with their patent.  
 12:38:26 19 Q. All right. I want to go back to Exhibit  
 12:38:31 20 No. 2 for a moment. You had approximately 20 minutes  
 12:38:37 21 to examine Exhibit No. 2 in your search for some  
 12:38:41 22 language related to contingency; correct?  
 12:38:41 23 A. Yes.  
 12:38:46 24 Q. All right, sir. And I am correct in  
 12:38:47 25 understanding that based on your experience and your

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12:38:51 1 review of Exhibit No. 2, you could not find any  
 12:38:54 2 language related to a construction contingency in this  
 12:38:57 3 project according to the contract between Petra and  
 12:38:58 4 City of Meridian?  
 12:38:59 5 MR. WALKER: Objection. Lack of foundation. The  
 12:39:03 6 document speaks for itself.  
 12:39:03 7 MR. TROUT: You can answer.  
 12:39:06 8 THE WITNESS: I did not find it. That's obvious.  
 12:39:08 9 I've said that.  
 12:39:10 10 MR. TROUT: All right. Thank you. Let's take  
 12:39:13 11 our noon break, and we'll be back here in an hour.  
 12:40:15 12 (Recess taken from 12:39 p.m. to 1:39 p.m.)  
 13:39:09 13 MR. TROUT: Back on the record in the deposition  
 13:39:11 14 of Mr. Lemley.  
 13:39:14 15 Q. (BY MR. TROUT) Mr. Lemley, going back to  
 13:39:21 16 your story about Bechtel and the Massachusetts Transit  
 13:39:27 17 Authority. Did Bechtel make any mistakes in that  
 13:39:28 18 project?  
 13:39:31 19 A. Yes. They made a lot of mistakes.  
 13:39:36 20 Q. Did they seek to charge the Transit  
 13:39:41 21 Authority for some, any, or all of their mistakes?  
 13:39:47 22 A. I think they charged the Turnpike Authority  
 13:39:52 23 for a number of their mistakes. I can't point to one  
 13:40:02 24 or two. They charged them an enormous amount of money  
 13:40:06 25 for a very poor job.

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25 (Pages 97 to 100)

13:40:09 1 Q. And part of your purpose in conducting the  
 13:40:14 2 audit was to seek to recover for the Authority money  
 13:40:19 3 that had been improperly charged by Bechtel; is that  
 13:40:20 4 right?  
 13:40:24 5 A. The first audit, that wasn't the case. I  
 13:40:28 6 was just giving the agency an overview of what was  
 13:40:31 7 wrong and what was right with the management of the  
 13:40:32 8 project.  
 13:40:39 9 The second audit I did -- the quality audit,  
 13:40:47 10 I did for the purpose of advising -- by that time they  
 13:40:49 11 had transferred that whole project to the  
 13:40:54 12 Massachusetts Department of Transportation. I did  
 13:41:06 13 that audit for -- under their auspices, and I  
 13:41:09 14 identified areas where there was bad work, and I  
 13:41:16 15 suggested that Bechtel Parsons Brinckerhoff owed the  
 13:41:25 16 state at least \$600 million. When my assignment was  
 13:41:34 17 done, I read that they had settled for \$484 million.  
 13:41:37 18 Q. Would I be fair in understanding that the  
 13:41:44 19 purpose of your second audit was to provide the  
 13:41:48 20 factual foundation for the recovery of money as  
 13:41:54 21 against Bechtel and Parsons Brinckerhoff?  
 13:41:59 22 A. Yes. And there were two things about it.  
 13:42:03 23 One of them was an initial payment from the program  
 13:42:15 24 manager to the owner as a figure that represented an  
 13:42:19 25 initial cost to the owner for repairing what they

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13:42:28 1 could repair. And the reason my evaluation of the --  
 13:42:32 2 of what Massachusetts should have gotten back was the  
 13:42:38 3 fact that there was contaminated water -- hazardous  
 13:42:42 4 water running into the tunnel, and it was already  
 13:42:53 5 eating up all of the conduit and the pump motor  
 13:43:00 6 controls in the various sumps that kept the water out  
 13:43:06 7 of the tunnel so it was an operable tunnel. And the  
 13:43:10 8 last thing I heard about that was that Massachusetts  
 13:43:17 9 had exceeded its discharge permit with the  
 13:43:23 10 Massachusetts Bay -- Boston Bay Cleanup Authority.  
 13:43:26 11 Q. Sir, let me narrow the question a little  
 13:43:34 12 bit. How much of the contingency in that project was  
 13:43:39 13 used to pay for Bechtel's errors?  
 13:43:43 14 A. I don't know. It was a very convoluted  
 13:43:47 15 process. The federal government was involved. The  
 13:43:53 16 state was involved. I don't know whether they ever  
 13:43:58 17 were ever able to unravel --  
 13:44:01 18 Q. In your professional opinion, would it have  
 13:44:04 19 been appropriate for the State of Massachusetts to use  
 13:44:10 20 any of its contingency money to pay for Bechtel  
 13:44:11 21 errors?  
 13:44:12 22 A. No, it wouldn't have been.  
 13:44:21 23 Q. Okay. Now --  
 13:44:28 24 A. Not because -- let me clarify that. Because  
 13:44:38 25 these were gross errors not errors that would be --

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13:44:42 1 that would develop in the normal course of performing  
 13:44:50 2 a job. The job was a very large job, and I think it  
 13:44:53 3 bordered on being a gross misconduct.  
 13:44:59 4 Q. Okay. So are there any authoritative  
 13:45:07 5 treatises that you can refer us to on the appropriate  
 13:45:10 6 use of an owner's contingency?  
 13:45:16 7 A. Well, I don't know. I can examine the  
 13:45:20 8 records and see what I can come up with, but I can't  
 13:45:21 9 tell you today.  
 13:45:23 10 Q. What records will you look at?  
 13:45:27 11 A. Well, I have an extensive library in my  
 13:45:28 12 office.  
 13:45:31 13 Q. Okay. And will you conduct that review and  
 13:45:35 14 then provide us whatever you can find that you  
 13:45:39 15 consider to be authoritative on the use of the owner's  
 13:45:41 16 contingency and construction project?  
 13:45:43 17 A. I'll provide you what I can find, yes.  
 13:45:44 18 Q. All right. Thank you.  
 13:46:11 19 In order to determine the standard of care  
 13:46:16 20 for Petra's conduct on the Meridian City Hall project,  
 13:46:22 21 is it in your professional opinion appropriate to  
 13:46:25 22 utilize Petra's Construction Management Agreement with  
 13:46:31 23 the City of Meridian to lay that foundation?  
 13:46:35 24 A. I believe it's imperative that that  
 13:46:39 25 agreement be used, because that was the agreement that

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13:46:44 1 governed everything Petra did on that site.  
 13:47:06 2 Q. Okay. And in your review for preparation  
 13:47:10 3 today, other than your initial discussions on the  
 13:47:14 4 Meridian City Hall site with Jerry Frank, Gene  
 13:47:18 5 Bennett, and Tom Coughlin, have you had any  
 13:47:23 6 discussions with them regarding this project?  
 13:47:27 7 A. No. I have also had conversations with  
 13:47:29 8 Counsel.  
 13:47:32 9 Q. And you are referring to Mr. Walker?  
 13:47:32 10 A. I am.  
 13:47:35 11 Q. All right. And tell me about your  
 13:47:39 12 conversations with Mr. Walker.  
 13:47:42 13 A. I think those are privileged, if I  
 13:47:43 14 understand that.  
 13:47:47 15 Q. Well, not if they relate to the formation of  
 13:47:52 16 your opinion, so as it relates to the formation of  
 13:47:54 17 your opinion in this case, tell me about your  
 13:47:56 18 conversations with Mr. Walker.  
 13:47:59 19 A. My opinion in this case was completed by the  
 13:48:02 20 time I spoke with Mr. Walker about it.  
 13:48:09 21 Q. All right. So I would be correct in  
 13:48:12 22 understanding that you did not have any conversations  
 13:48:24 23 with Mr. Walker regarding this matter prior to June  
 13:48:28 24 10th, 2010; is that correct?  
 13:48:36 25 A. When he hired us, yes. And Mr. Bauer had

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26 (Pages 101 to 104)

13:48:39 1 some communication with Mr. Walker, I think.  
 13:48:43 2 Q. All right. And did Mr. Bauer relate his  
 13:48:46 3 conversations with Mr. Walker to you?  
 13:48:51 4 A. Probably, but I don't have specific recall.  
 13:49:00 5 I do know that Mr. Bauer is reviewing his notes for  
 13:49:08 6 anything that he believes is germane to this  
 13:49:13 7 commission, and that will be transmitted to you as he  
 13:49:14 8 completes that assignment.  
 13:49:24 9 Q. All right. So if I understand your  
 13:49:27 10 testimony correctly, other than your initial  
 13:49:32 11 conversation on site with Mr. Frank, Mr. Bennett, and  
 13:49:36 12 Mr. Coughlin, you've not had any other discussions  
 13:49:42 13 with any Petra representative regarding this case; is  
 13:49:42 14 that right?  
 13:49:46 15 A. Well, those three people would be the extent  
 13:49:52 16 of my conversation with Petra organization, yes.  
 13:50:04 17 Q. All right. And other than Mr. Bauer, who  
 13:50:09 18 else have you discussed this case with?  
 13:50:12 19 A. Well, I have discussed it with  
 13:50:16 20 Mr. McGlothlin.  
 13:50:20 21 Q. Okay. Anyone else?  
 13:50:20 22 A. My wife.  
 13:50:27 23 Q. Okay. And did you keep any record of any  
 13:50:32 24 kind of your discussions with Mr. Bauer regarding this  
 13:50:33 25 case?

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13:50:36 1 A. I didn't keep any records of it, other than  
 13:50:42 2 what's in my daytimer that included the time that I  
 13:50:44 3 had discussions with Mr. Bauer.  
 13:50:47 4 Q. Okay. And as we sit here today, what's the  
 13:50:51 5 total amount of time that you have currently devoted  
 13:50:54 6 to this case?  
 13:50:57 7 A. I can't tell you.  
 13:50:59 8 Q. Five hours, ten hours?  
 13:51:03 9 A. I would have to consult with the office.  
 13:51:04 10 More than five.  
 13:51:07 11 Q. More than ten?  
 13:51:08 12 A. More than ten.  
 13:51:12 13 Q. More than twenty?  
 13:51:16 14 A. I don't know. More than ten. I don't know  
 13:51:17 15 about more than 20.  
 13:51:19 16 Q. All right. And what's your hourly rate,  
 13:51:20 17 sir?  
 13:51:22 18 A. \$350.  
 13:51:27 19 Q. Okay. And what's Mr. Bauer's hourly rate?  
 13:51:27 20 A. \$200.  
 13:51:33 21 Q. And Mr. -- is it McGlothlin?  
 13:51:33 22 A. Yes.  
 13:51:36 23 Q. What's his hourly rate?  
 13:51:36 24 A. \$100.  
 13:51:40 25 Q. Do you know what the total amount that you

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13:51:44 1 have billed to Cosho Humphrey to date is?  
 13:51:45 2 A. No, I don't.  
 13:51:55 3 Q. Okay. Turning your attention to Exhibit  
 13:52:00 4 No. 2 again, if we could, please, which is the  
 13:52:01 5 Construction Management Agreement.  
 13:52:01 6 A. Yes.  
 13:52:08 7 Q. Based on your review, can you tell me what  
 13:52:14 8 the plans for the project consisted of as of August  
 13:52:16 9 1st, 2006?  
 13:52:21 10 A. I think they consisted of conceptual ideas  
 13:52:33 11 that were transmitted to Petra on a conceptual basis.  
 13:52:38 12 I don't know how much detail planning had been done.  
 13:52:41 13 Q. All right. Did you inquire at all before  
 13:52:44 14 you wrote your report as to what plans were in  
 13:52:50 15 existence as of August 1st, 2006?  
 13:52:58 16 A. I inquired of -- yes, of Petra, and they  
 13:53:04 17 said that they had no plans early on, other than what  
 13:53:06 18 is described in their contract.  
 13:53:14 19 Q. Okay. And so when -- in your review of this  
 13:53:18 20 matter and all of the documents that were provided to  
 13:53:31 21 you in these three notebooks, Exhibit Nos. 87, 86, and  
 13:54:03 22 88, can you tell me as of August 1st, 2006, how much  
 13:54:09 23 time Petra estimated it would devote to the scope of  
 13:54:11 24 work within the building?  
 13:54:11 25 A. I don't recall.

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13:54:19 1 Q. In your review of this case for the  
 13:54:25 2 preparation of your opinion, can you tell me how much  
 13:54:32 3 time Petra intended to spend in managing the plaza and  
 13:54:36 4 site work as of August 1st, 2006?  
 13:54:39 5 A. No. I think it's in the record, but I don't  
 13:54:39 6 recall.  
 13:54:43 7 Q. You think you have some document that  
 13:54:47 8 reflects their estimate of time; is that correct?  
 13:54:53 9 A. Well, I have some document that breaks down  
 13:54:58 10 the hours that -- and identifies the people that would  
 13:55:04 11 be on the project. Whether it's tied to the plaza, I  
 13:55:04 12 don't know.  
 13:55:12 13 Q. Okay. Can you tell me, based on your  
 13:55:24 14 review, how much time Petra anticipated on managing  
 13:55:30 15 the size of the city council chambers at the time it  
 13:55:33 16 signed the agreement August 1st, 2006?  
 13:55:33 17 A. No.  
 13:55:37 18 Q. Can you tell me based on your review how  
 13:55:42 19 much time Petra anticipated managing the construction  
 13:55:48 20 of the building exterior at the time it signed it's  
 13:55:51 21 agreement on August 1st, 2006?  
 13:55:52 22 A. No.  
 13:55:55 23 Q. Can you tell me based on your review how  
 13:56:00 24 much Petra estimated spending in managing the  
 13:56:05 25 mechanical system as of the time it signed it's

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27 (Pages 105 to 108)

13:56:09 1 agreement on August 1st, 2006?

13:56:15 2 A. No. But I know that the mechanical was much

13:56:22 3 more sophisticated than what they had expected when

13:56:23 4 they tendered the job.

13:56:30 5 Q. Well, can you identify for me in Exhibit

13:56:34 6 No. 2, which is the Construction Management Agreement,

13:56:39 7 where the mechanical system for this project is

13:56:40 8 defined?

13:56:45 9 A. When I read through it a little bit ago, I

13:56:50 10 did not see that. But the building was identified as

13:56:59 11 an 80,000 square foot Class A office building, which

13:57:07 12 would have an implication relative to a standard type

13:57:11 13 of building which Petra had been managing in the

13:57:11 14 general area.

13:57:13 15 Q. Well --

13:57:17 16 A. So I presume they would have accounted for

13:57:21 17 management of the mechanical systems.

13:57:27 18 Q. Let's break all of that down, shall we? In

13:57:33 19 your study of this project, can you tell me what

13:57:38 20 specific Petra office building projects you

13:57:43 21 familiarized yourself with prior to taking on this

13:57:44 22 commission?

13:57:50 23 A. Not many, but I know of a number that I

13:57:54 24 have -- where I have seen their signs, but I have not

13:58:01 25 delved into the contracts or how the projects have

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13:58:01 1 turned out.

13:58:06 2 Q. All right. So you don't have any personal

13:58:10 3 or professional knowledge with respect to any specific

13:58:13 4 building project that Petra may have worked on prior

13:58:18 5 to taking your commission in this case; correct?

13:58:18 6 A. That's correct.

13:58:32 7 Q. All right. So based upon your experience as

13:58:39 8 a construction manager, can you tell me how much time

13:58:44 9 Petra should have estimated spending in managing the

13:58:48 10 mechanical system for the project as of August 1st,

13:58:51 11 2006?

13:58:52 12 A. No, I can't.

13:59:00 13 Q. Okay. Can you tell me, based upon your

13:59:05 14 professional experience, how much time Petra should

13:59:08 15 have anticipated on the management of the building

13:59:14 16 exterior as of August 1st, 2006?

13:59:16 17 A. I believe that there was a difference

13:59:22 18 between the exterior that they may have been thinking

13:59:28 19 about and the exterior that was actually completed.

13:59:31 20 Q. Well, let me ask you two questions as a

13:59:35 21 follow up to that. Can you point out in Exhibit

13:59:38 22 No. 2, the Construction Management Agreement, where

13:59:42 23 the description of the building exterior can be found?

13:59:44 24 A. No, because I don't believe there is one.

13:59:48 25 Q. All right. Now I'm going to re-ask the

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13:59:52 1 question I asked you earlier. As a construction

13:59:59 2 management professional, how much time should Petra

14:00:04 3 have anticipated spending on managing the construction

14:00:13 4 of the building exterior as of August 1st, 2006?

14:00:15 5 A. That in accordance with the building that

14:00:21 6 was described to them at the time they took the

14:00:25 7 contract that is outlined in their contract?

14:00:27 8 Q. Is that a question, sir?

14:00:29 9 A. I was trying to clarify your question.

14:00:34 10 Q. Well, let me ask it as simply as I can. As

14:00:40 11 a construction management professional, can you tell

14:00:44 12 me how much time Petra should have anticipated

14:00:51 13 spending on the management of the exterior building

14:00:55 14 construction as of August 1st, 2006.

14:01:02 15 MR. WALKER: Objection. Asked and answered.

14:01:07 16 THE WITNESS: I think I have indicated to you

14:01:14 17 that the rest of that -- in order to answer the

14:01:19 18 question, you have to go back to the reference that

14:01:23 19 was given to Petra about the building itself. It was

14:01:33 20 to be an 80,000 square foot building constructed to

14:01:42 21 Class A standard specifications. Now, that wouldn't

14:01:53 22 suggest any specialized exterior. I think from that,

14:01:58 23 they could have assumed that it would have been a very

14:02:01 24 simple exterior, which they could have subcontracted

14:02:11 25 to a subcontractor, and their oversight might have

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14:02:13 1 been one or two people.

14:02:16 2 Q. (BY MR. TROUT) Okay. Well, let me ask you

14:02:22 3 this question: Based on the description you just gave

14:02:29 4 me, how much time would you have anticipated or

14:02:36 5 estimated that would have been spent by Petra on the

14:02:39 6 management of the construction of the exterior of the

14:02:46 7 building described in Exhibit No. 2, as of August 1st,

14:02:47 8 2006?

14:02:48 9 MR. WALKER: Objection. Lack of foundation.

14:02:55 10 THE WITNESS: Well, I believe that 24 to 48 hours

14:03:00 11 of Petra's time given the fact that they would have

14:03:07 12 contracted the closing in of the shell of the building

14:03:12 13 to a subcontractor.

14:03:16 14 Q. (BY MR. TROUT) So if I understand your

14:03:20 15 testimony correctly, you would have expected Petra to

14:03:23 16 contract with a subcontractor for the closing in of

14:03:26 17 the shell of the building for this project; is that

14:03:27 18 right?

14:03:31 19 A. I would have expected that Petra would have

14:03:39 20 worked with the City of Meridian to issue a contract

14:03:44 21 to a contractor to do the closing in of the shell of

14:03:46 22 the building.

14:04:07 23 Q. Okay. So based upon your professional

14:04:13 24 review of the records in this matter that you've been

14:04:22 25 provided in Exhibit Nos. 86, 87, and 88, can you tell

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28 (Pages 109 to 112)

14:04:28 1 me how much time Petra estimated it would spend on  
 14:04:32 2 managing the construction of the building exterior as  
 14:04:36 3 of August 1st, 2006?  
 14:04:41 4 A. I have not been privy to Petra's estimate.  
 14:04:49 5 Q. Okay. And if Petra didn't create an  
 14:04:53 6 estimate of how much time it would spend managing the  
 14:04:58 7 building exterior -- or the construction of the  
 14:05:04 8 building exterior as of August 1st, 2006, we would  
 14:05:09 9 have nothing to measure their time against as they  
 14:05:12 10 have reported today, isn't that correct?  
 14:05:14 11 MR. WALKER: Objection. Lack of foundation. And  
 14:05:20 12 also there is more than one question in that question.  
 14:05:24 13 THE WITNESS: Unless we had their estimate, we  
 14:05:27 14 wouldn't know what they thought they were going to do  
 14:05:34 15 as opposed to what they did do. The only thing that  
 14:05:40 16 can be done at this point is to speculate on what  
 14:05:45 17 might have been an adequate number, and not having  
 14:05:50 18 been on the project, that's all I can do is speculate.  
 14:05:50 19 MR. TROUT: Right.  
 14:05:53 20 Q. (BY MR. TROUT) And so if we really wanted  
 14:05:59 21 to know how much time, for example, Petra spent in  
 14:06:04 22 managing the construction of the building exterior,  
 14:06:07 23 we'd need to look at the specific time records that  
 14:06:10 24 recorded that activity, wouldn't we, sir?  
 14:06:13 25 A. That would give you the most accurate

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14:08:21 1 would go to each of those entities and get their  
 14:08:30 2 reference -- their data and triangulate that data to  
 14:08:39 3 find out what the city council chamber clear span  
 14:08:39 4 cost.  
 14:08:41 5 Q. (BY MR. TROUT) All right. And what does  
 14:08:47 6 the cost of the city council chamber clear span have  
 14:08:51 7 to do with the specific amount of time that Petra  
 14:08:56 8 spent in managing that portion of the work?  
 14:09:02 9 A. It's a hell of a lot easier to put in a  
 14:09:07 10 series of columns with a beam across the top of them  
 14:09:14 11 than it is to put in a large clear span truss, and it  
 14:09:18 12 takes much more time to do the second.  
 14:09:21 13 Q. All right. And that time, of course, would  
 14:09:26 14 have been expended by the steel fabricator and steel  
 14:09:27 15 erector?  
 14:09:29 16 A. That's what I suggested to you, sir. I  
 14:09:30 17 think I answered that question.  
 14:09:32 18 Q. All right. And Petra didn't do any of the  
 14:09:35 19 actual physical construction; correct?  
 14:09:35 20 A. No, they didn't.  
 14:09:42 21 Q. All right.  
 14:09:45 22 A. Not that I'm aware of.  
 14:10:00 23 Q. Okay. And wouldn't I be correct in  
 14:10:10 24 understanding that, for example, the steel fabrication  
 14:10:15 25 and erection for this project would have been in the

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14:06:13 1 information, yes.  
 14:06:19 2 Q. All right, sir. And as a construction  
 14:06:24 3 management professional, in your experience, you have  
 14:06:29 4 certainly seen construction managers keep detailed and  
 14:06:32 5 accurate time records of their specific activities,  
 14:06:34 6 have you not?  
 14:06:35 7 A. I have.  
 14:06:36 8 MR. WALKER: Objection. Lack of foundation.  
 14:06:37 9 Q. (BY MR. TROUT) And, in fact, in the  
 14:06:41 10 performance of your work as a construction manager,  
 14:06:45 11 the folks at Lemley International keep detailed and  
 14:06:49 12 specific time records of their activities in order to  
 14:06:52 13 report that to their clients, isn't that correct?  
 14:06:52 14 A. That's correct.  
 14:07:26 15 Q. All right. And if we wanted to know exactly  
 14:07:32 16 how much time Petra had spent in managing the  
 14:07:39 17 structural size of the city council chambers, we  
 14:07:42 18 should look at the Petra time records to determine  
 14:07:46 19 that, shouldn't we, sir?  
 14:07:47 20 MR. WALKER: Objection. Lack of foundation.  
 14:07:50 21 THE WITNESS: Well, I think there would be two  
 14:07:56 22 potential sources of information on that -- actually,  
 14:08:02 23 three. One, the architect, he knew what he designed;  
 14:08:09 24 two, the steel fabricator; and three, the steel  
 14:08:14 25 erection contractor. So if that's a major issue, I

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14:10:21 1 Phase II core and shell bids; is that correct?  
 14:10:22 2 A. It should have been, yes.  
 14:10:26 3 Q. All right. So at the time that the steel  
 14:10:34 4 erection for the city council chambers was planned,  
 14:10:38 5 that set of plans would be included in the bid  
 14:10:43 6 documents that were sent out for bid in the Phase II  
 14:10:46 7 core and shell bids; correct?  
 14:10:49 8 A. Well, I don't know when it was sent out.  
 14:10:52 9 You have access to those records and can determine  
 14:10:52 10 that specifically.  
 14:10:56 11 Q. All right. Well, I'm not asking you when,  
 14:11:00 12 but would I be correct in understanding that all of  
 14:11:06 13 the plans for the structural steel should have been  
 14:11:10 14 included in the Phase II core and shell bids when they  
 14:11:11 15 were sent out for bid?  
 14:11:13 16 MR. WALKER: Objection. Lack of foundation.  
 14:11:18 17 THE WITNESS: My answer to that is, logic would  
 14:11:21 18 suggest that that is the case. I don't know  
 14:11:24 19 specifically whether that was done or not.  
 14:11:26 20 Q. (BY MR. TROUT) Okay. And you haven't done  
 14:11:31 21 anything to investigate whether that was done, isn't  
 14:11:33 22 that correct?  
 14:11:35 23 A. I was not asked to do that.  
 14:11:39 24 Q. And would I be correct if I assumed  
 14:11:45 25 logically that all of the required exterior stone and

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29 (Pages 113 to 116)



14:11:48 1 brick would have been included in the bid documents  
 14:11:51 2 that would have been sent out for bid as part of the  
 14:11:55 3 Phase II core and shell?  
 14:11:57 4 MR. WALKER: Objection. Lack of foundation.  
 14:12:00 5 THE WITNESS: Yeah. I don't have any idea how  
 14:12:05 6 much of the shell was in place. It wouldn't have done  
 14:12:14 7 any good to solicit bids for stone and brick unless  
 14:12:20 8 they had something, one, to set it on; and two, to  
 14:12:25 9 attach it to as they went up through the building.  
 14:12:29 10 Q. (BY MR. TROUT) So would I be correct in  
 14:12:35 11 understanding that you haven't examined any of the bid  
 14:12:36 12 documents?  
 14:12:37 13 A. No, I haven't.  
 14:12:42 14 Q. Okay. And did you understand as part of  
 14:12:48 15 your commission in this case that Petra had a  
 14:12:50 16 responsibility for the preparation and review of the  
 14:12:53 17 bid documents?  
 14:12:54 18 A. I did have.  
 14:12:57 19 Q. Okay. And is my understanding correct that  
 14:13:00 20 Petra was, in fact, responsible for the preparation  
 14:13:08 21 and review of the bid documents before they went out?  
 14:13:12 22 A. I am not positive whether they were the  
 14:13:17 23 final reviewer. I would expect the architect would  
 14:13:23 24 have reviewed some of those documents along with the  
 14:13:26 25 City fathers themselves.

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14:13:29 1 Q. Do you have an understanding that Petra had  
 14:13:31 2 a responsibility to review bid documents?  
 14:13:31 3 A. Yes.  
 14:13:39 4 Q. All right. And in reviewing the bid  
 14:13:45 5 documents, based upon your experience as a  
 14:13:49 6 construction manager, would I be correct in  
 14:13:54 7 understanding that a review of the bid documents would  
 14:14:00 8 identify, for example, the size of the city council  
 14:14:02 9 chambers?  
 14:14:03 10 MR. WALKER: Objection. Lack of foundation.  
 14:14:08 11 THE WITNESS: If there was a unique reason to  
 14:14:11 12 believe that there was going to be a unique  
 14:14:16 13 requirement relative to the city council chambers, I  
 14:14:18 14 would expect they would have reviewed it, yes.  
 14:14:20 15 Q. (BY MR. TROUT) And that those would have  
 14:14:23 16 been in the bid documents; correct?  
 14:14:24 17 MR. WALKER: Objection. Lack of foundation.  
 14:14:29 18 THE WITNESS: If they had known -- if the City's  
 14:14:34 19 criteria was specifically outlined, it should have  
 14:14:36 20 been provided for in the bid documents.  
 14:14:38 21 Q. (BY MR. TROUT) Okay. And the same would be  
 14:14:43 22 true that if Petra reviewed the bid documents with  
 14:14:46 23 respect to the exterior stone and brick, they would  
 14:14:50 24 have knowledge of what the City was requesting or  
 14:14:54 25 requiring for the contractors to bid on?

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14:14:57 1 MR. WALKER: Objection. Lack of foundation.  
 14:14:58 2 THE WITNESS: Yes. Presumably.  
 14:15:01 3 Q. (BY MR. TROUT) Okay. And would your answer  
 14:15:04 4 be the same with respect to the mechanical system that  
 14:15:06 5 was placed out for bid?  
 14:15:08 6 MR. WALKER: Objection. Lack of foundation.  
 14:15:11 7 Also vague as to time.  
 14:15:12 8 THE WITNESS: To the extent that there was  
 14:15:16 9 specific information on the systems involved and what  
 14:15:20 10 the requirements were, I would say they should have  
 14:15:22 11 been aware of it, yes.  
 14:15:25 12 Q. (BY MR. TROUT) And if Mr. Bennett testified  
 14:15:31 13 under oath that as the project manager he was  
 14:15:35 14 personally aware of the size of the city council  
 14:15:39 15 chambers at the time they went out for bid, would you  
 14:15:42 16 have any reason to disagree with him?  
 14:15:42 17 A. No.  
 14:15:45 18 Q. If Mr. Bennett testified under oath that he  
 14:15:49 19 was aware of the required exterior stone and brick  
 14:15:53 20 that was placed out for bid at the time it was placed  
 14:15:57 21 out for bid, would you have any reason to disagree  
 14:15:58 22 with him?  
 14:15:58 23 A. No.  
 14:16:02 24 Q. If Mr. Bennett testified that he was aware  
 14:16:06 25 of the mechanical system that was placed out for bid

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14:16:09 1 at the time it was placed out for bid, would you have  
 14:16:12 2 any reason to disagree with him?  
 14:16:12 3 A. No.  
 14:16:17 4 Q. If Mr. Bennett testified under oath that he  
 14:16:22 5 was aware of the electrical system plans that were  
 14:16:25 6 placed out for bid at the time they were placed out  
 14:16:30 7 for bid, would you have any reason to disagree with  
 14:16:31 8 him?  
 14:16:32 9 A. I would not.  
 14:16:43 10 Q. Okay. If Mr. Bennett was aware of the Petra  
 14:16:47 11 proposal to the City of Meridian for LEED  
 14:16:57 12 certification as of the time that they did their  
 14:17:01 13 pre-contract interviews with the City, would you have  
 14:17:05 14 any reason to disagree with him?  
 14:17:07 15 MR. WALKER: Objection. Lack of foundation and  
 14:17:10 16 vague as to the term "pre-contract interview."  
 14:17:11 17 MR. TROUT: Well, I'll clarify that.  
 14:17:14 18 Q. (BY MR. TROUT) Did Mr. Bennett tell you  
 14:17:18 19 that as part of their response to the request for  
 14:17:22 20 proposals from the City of Meridian before Meridian  
 14:17:24 21 hired a construction manager that they made a  
 14:17:26 22 presentation to the City?  
 14:17:28 23 A. Yes, I understood they did.  
 14:17:32 24 Q. Okay. Did Mr. Bennett tell you in that  
 14:17:35 25 presentation that they made a presentation with

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14:17:39	1	respect to LEED certification to the City?	14:21:35	1	to estimate how much time it was going to spend
14:17:41	2	A. I understood that they did, yes.	14:21:40	2	managing ASIs for the Meridian City Hall project?
14:17:47	3	Q. All right. So certainly even before the	14:21:41	3	A. Probably not accurately.
14:17:51	4	contract was signed, if Petra made a presentation with	14:21:47	4	Q. Okay. As of August 1st, 2006, in your
14:17:56	5	respect to LEED certification they were aware that the	14:21:52	5	professional opinion as a construction manager, was it
14:17:59	6	City was seeking that for this project, wouldn't you	14:21:56	6	possible for Petra to estimate how much time it would
14:18:00	7	agree?	14:22:00	7	spend managing requests for information or RFIs for
14:18:00	8	A. Yes.	14:22:04	8	the Meridian City Hall project?
14:18:37	9	Q. All right. As of August 1st, 2006, in your	14:22:07	9	A. I doubt it.
14:18:44	10	professional opinion as a construction manager how	14:22:54	10	Q. Okay. Based upon your review roughly an
14:18:50	11	much time should Petra have anticipated spending in	14:22:57	11	hour ago of the Construction Management Agreement,
14:18:53	12	the management of architectural supplemental	14:23:06	12	which is Exhibit No. 2, can you tell me what kind of
14:18:58	13	instructions or ASIs?	14:23:13	13	electrical system was described for the project?
14:19:01	14	MR. WALKER: Objection. Lack of foundation.	14:23:15	14	A. The electrical system for the project wasn't
14:19:03	15	Also calls for speculation.	14:23:17	15	described in Petra's contract.
14:19:05	16	MR. TROUT: I'll clarify the question. I	14:23:21	16	Q. Okay. Based upon your review of Exhibit
14:19:08	17	apologize, Mr. Lemley. Let me ask it this way.	14:23:33	17	No. 2, can you describe for me what was described in
14:19:12	18	Q. (BY MR. TROUT) For the Meridian City Hall	14:23:38	18	Petra's contract with respect to the utilization of
14:19:16	19	project as described in Exhibit No. 2, the	14:23:42	19	office space?
14:19:21	20	Construction Management Agreement, as of August 1st,	14:23:46	20	A. No. And I have no recall of that.
14:19:26	21	2006, in your professional opinion as a construction	14:23:54	21	Q. All right. With respect to Exhibit No. 2,
14:19:29	22	manager how much time should Petra have anticipated	14:24:02	22	can you describe for me what the plaza and site work
14:19:36	23	spending in the management of ASIs or architectural	14:24:11	23	was denominated as?
14:19:39	24	supplemental information request.	14:24:14	24	A. In terms of space or --
14:19:40	25	MR. WALKER: Objection. Calls for speculation	14:24:17	25	Q. In any terms.
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14:19:42	1	and lacks foundation.	14:24:24	1	A. Well, they were -- the parking was certainly
14:19:46	2	THE WITNESS: Until they got familiar with the	14:24:30	2	called for in the original contract. The plaza area
14:19:49	3	architect and how well the architect has done his	14:24:33	3	was definitely an added feature.
14:19:53	4	work, it would be very hard to estimate that number.	14:24:36	4	Q. So it's your professional opinion that there
14:19:54	5	MR. TROUT: All right.	14:24:40	5	was no plaza work considered in the original
14:19:56	6	Q. (BY MR. TROUT) Can you estimate that number	14:24:42	6	agreement; is that correct?
14:20:00	7	as we sit here today?	14:24:45	7	A. I won't say there was no plaza work
14:20:03	8	A. Well, I can estimate it, but I don't have	14:24:47	8	considered in the original agreement. There is
14:20:07	9	all the detail that Petra would have had.	14:24:52	9	nothing in the contract that I've read that identifies
14:20:12	10	Q. Okay. Well, what's your estimate as to how	14:24:54	10	the plaza work.
14:20:17	11	much time Petra should have expected to spend in the	14:25:04	11	Q. All right. Tell me what, if any,
14:20:21	12	management of ASIs for the project described in	14:25:08	12	identification in Exhibit No. 2 you found for the size
14:20:24	13	Exhibit No. 2, the Construction Management Agreement,	14:25:11	13	of the city council chambers?
14:20:28	14	as of August 1st, 2006?	14:25:13	14	A. I didn't find any.
14:20:30	15	MR. WALKER: Objection. Lack of foundation.	14:25:17	15	Q. Tell me what, if any, identification you
14:20:31	16	Calls for speculation.	14:25:22	16	found in Exhibit No. 2 for the exterior cladding for
14:20:43	17	THE WITNESS: I think that if they had had access	14:25:24	17	the building?
14:20:51	18	to all of the drawings and specifications, they could	14:25:25	18	A. I didn't find any.
14:21:07	19	have estimated a time for reviewing the AFIs and RFIs,	14:25:28	19	Q. Tell me what, if any, identification you
14:21:12	20	but until they had worked with the plans and with	14:25:32	20	found in Exhibit No. 2 which described the mechanical
14:21:17	21	their general contractors, it would take a bit of time	14:25:34	21	system to be used in the building?
14:21:21	22	to develop the information required to make that	14:25:35	22	A. I didn't find any.
14:21:23	23	estimate.	14:25:39	23	Q. Tell me what, if any, identification you
14:21:28	24	Q. (BY MR. TROUT) As of August 1st, 2006, in	14:25:42	24	found in Exhibit No. 2 that described the electrical
14:21:32	25	your professional opinion, was it possible for Petra	14:25:46	25	system to be used within the building?
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14:25:46 1 A. None.  
 14:26:16 2 Q. Okay. In preparing your opinion, did you  
 14:26:21 3 review any of the prime contracts for this project  
 14:26:24 4 between the City and any prime contractor?  
 14:26:24 5 A. No, I did not.  
 14:26:40 6 Q. Okay. What's an estimate?  
 14:26:41 7 MR. WALKER: Objection. Asked and answered.  
 14:26:44 8 Q. (BY MR. TROUT) If I've asked you that, I  
 14:26:49 9 apologize, but if you'll refresh my recollection for  
 14:26:53 10 your answer, sir, I would be appreciative.  
 14:26:56 11 A. Well, I think earlier I said an estimate is  
 14:26:59 12 a calculation of the amount of resource and time that  
 14:27:02 13 it would take to do a specific task.  
 14:27:09 14 Q. All right. What's a budget?  
 14:27:15 15 A. A budget is usually a result of an estimate  
 14:27:25 16 and normally a budget is set below an estimate so that  
 14:27:34 17 the management and the owner can be confident that  
 14:27:38 18 their resources won't be over run.  
 14:27:46 19 Q. Okay. In your experience, have you ever  
 14:27:51 20 worked with an Idaho municipality?  
 14:27:52 21 A. No.  
 14:27:59 22 Q. Would I be correct in understanding then  
 14:28:03 23 that you don't have any personal knowledge of how an  
 14:28:11 24 Idaho municipality sets a budget or adopts a budget?  
 14:28:11 25 A. That's correct.

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14:28:27 1 Q. Okay. And would I be correct in  
 14:28:29 2 understanding that you don't have any personal  
 14:28:32 3 knowledge of how, if at all, the City of Meridian  
 14:28:37 4 adopted a budget for this project; correct?  
 14:28:37 5 A. That's correct.  
 14:28:45 6 Q. Did the City of Meridian have a right to  
 14:28:49 7 rely on the written representations made by Petra to  
 14:28:52 8 them with respect to this project?  
 14:28:55 9 MR. WALKER: Objection. Calls for a legal  
 14:28:56 10 conclusion.  
 14:28:58 11 THE WITNESS: The representations with regard to  
 14:28:59 12 what, sir?  
 14:29:02 13 Q. (BY MR. TROUT) Any representation made by  
 14:29:06 14 Petra. Did the City have a right to rely on what  
 14:29:08 15 Petra told them?  
 14:29:11 16 A. Yes, as it related to their contracts.  
 14:29:20 17 Q. Okay.  
 14:29:23 18 MR. TROUT: Let's take our first afternoon break.  
 14:38:04 19 (Recess taken at 2:29 p.m. to 2:38 p.m.)  
 14:38:31 20 MR. TROUT: Back on the record in the deposition  
 14:38:34 21 of Mr. Lemley.  
 14:38:49 22 Q. (BY MR. TROUT) Sir, in the volume that is  
 14:38:54 23 in front of you, could you please turn to Exhibit  
 14:39:08 24 No. 14.  
 14:39:15 25 Can you tell me what Exhibit No. 14 is?

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14:39:25 1 A. It is a notice for intent to submit a formal  
 14:39:31 2 change order request from Petra to the City of  
 14:39:34 3 Meridian, Mr. Keith Watts.  
 14:39:46 4 Q. All right. Now, if I could, sir, you -- if  
 14:39:51 5 you would, please, in your report, which is Exhibit  
 14:40:03 6 No. 91, could you turn to page 3 of 12 in your report.  
 14:40:03 7 A. Yes, sir.  
 14:40:32 8 Q. In the very last paragraph, you indicate --  
 14:40:37 9 the third sentence up from the bottom -- "Petra  
 14:40:41 10 formally notified the City of Change Order No. 2 in  
 14:40:44 11 November of '07."  
 14:40:48 12 Do you see that, sir?  
 14:40:52 13 A. I do, yes.  
 14:40:57 14 Q. All right, sir. And is the notice that  
 14:41:09 15 you're referring to Exhibit No. 14?  
 14:41:10 16 A. It looks like it, yes.  
 14:41:14 17 Q. And based upon your review of the  
 14:41:18 18 Construction Management Agreement, which is Exhibit  
 14:41:33 19 No. 2, was Petra contractually obligated to give this  
 14:41:35 20 notice to the City?  
 14:41:36 21 A. I believe they were, yes.  
 14:41:39 22 Q. All right. Now, turning your attention to  
 14:41:45 23 the very next sentence on page 3 of 12, Exhibit  
 14:41:51 24 No. 91, you say the City did not object to this  
 14:41:53 25 notification; correct?

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14:41:54 1 A. That's what I say.  
 14:41:58 2 Q. All right. If you would turn to Exhibit  
 14:42:01 3 No. 2 again.  
 14:42:19 4 A. Yes, sir. I'm there.  
 14:42:23 5 Q. Is it your contention as a construction  
 14:42:26 6 management professional that the City had a  
 14:42:29 7 contractual duty to object to that notification by  
 14:42:30 8 Petra?  
 14:42:32 9 MR. WALKER: Objection. Calls for a legal  
 14:42:40 10 conclusion, and also the document speaks for itself.  
 14:42:44 11 THE WITNESS: Well, as we agreed at the beginning  
 14:42:50 12 of this deposition, I am not a lawyer.  
 14:42:58 13 MR. TROUT: All right, sir.  
 14:43:02 14 Q. (BY MR. TROUT) And so my question is: Is  
 14:43:08 15 there something that you contend exists in Exhibit  
 14:43:12 16 No. 2 that required the City to object to the notice  
 14:43:14 17 that was provided by Petra?  
 14:43:18 18 MR. WALKER: Objection. The document speaks for  
 14:43:19 19 itself.  
 14:43:21 20 Q. (BY MR. TROUT) And I'm not asking you for a  
 14:43:25 21 legal conclusion, I'm just asking if there is  
 14:43:28 22 something you rely on in Exhibit No. 2 to draw your  
 14:43:33 23 conclusion that the City should have objected to the  
 14:43:36 24 notice?  
 14:43:47 25 A. Well, I think good practice is to keep

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14:43:51	1	correspondence current so everybody knows where they	14:50:43	1	and work categories.
14:44:01	2	stand in a contractual relationship. And if one party	14:50:48	2	Q. All right. And would I be correct in
14:44:12	3	refuses to respond, it leaves the other party in doubt	14:50:53	3	understanding that that final cost estimate would have
14:44:15	4	where they stand or what their obligation is.	14:51:00	4	been prepared before the bids went out?
14:44:21	5	Q. And so would it be your conclusion as a	14:51:03	5	MR. WALKER: Objection. Lack of foundation.
14:44:24	6	construction management professional that Petra should	14:51:06	6	THE WITNESS: It may have, or it may have waited
14:44:27	7	have signed the LEED change order when it was	14:51:12	7	until they got their bids back from their selected
14:44:30	8	submitted to them by the City in the amount of	14:51:19	8	contractors that were competing for the work.
14:44:33	9	\$205,000?	14:51:23	9	Q. (BY MR. TROUT) Well, how could you prepare
14:44:34	10	MR. WALKER: Objection. Lack of foundation.	14:51:35	10	a final cost estimate -- well, let me ask the question
14:44:37	11	THE WITNESS: Well, I don't know whether they	14:51:40	11	in a different way. A cost estimate is an estimate of
14:44:43	12	should have or not. They should have responded to the	14:51:44	12	cost, not actual cost, isn't that correct?
14:44:47	13	change order regardless of whether they signed it or	14:51:44	13	A. That's correct.
14:44:49	14	not.	14:51:50	14	Q. All right. And so by definition a final
14:44:50	15	MR. TROUT: Okay.	14:51:56	15	cost estimate would have to be prepared before any
14:45:20	16	Q. (BY MR. TROUT) Now, could you please turn	14:51:59	16	bids were received, isn't that correct?
14:45:34	17	to Exhibit No. 10 in the book in front of you.	14:52:03	17	A. Well, it could be prepared before bids were
14:45:34	18	A. Yes, sir.	14:52:10	18	received, but it would be more accurate to get certain
14:45:42	19	Q. Have you seen this document before?	14:52:21	19	of the bidders data in and consolidate it into a final
14:45:50	20	A. I've seen similar documents, yes.	14:52:23	20	cost estimate.
14:45:53	21	Q. Well, my question is: Have you specifically	14:52:26	21	Q. Well --
14:45:57	22	seen this document before?	14:52:33	22	A. This is an agent, CM contract, so they were
14:46:05	23	A. I believe I have, yes.	14:52:40	23	undoubtedly trying to give the owner as accurate a
14:46:12	24	Q. All right. And did you utilize this	14:52:45	24	picture of where the project stood as was possible.
14:46:19	25	document in any fashion in formulating your company's	14:52:51	25	Q. Okay. So tell me when, based on your
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14:46:23	1	opinion in this case?	14:52:58	1	review, Petra prepared the final cost estimate that is
14:46:29	2	A. To the extent that we satisfied ourselves	14:53:04	2	contained or required by section 4.5.9 of Exhibit
14:46:43	3	that Petra was in fact keeping up with the project as	14:53:07	3	No. 2, the Construction Management Agreement?
14:46:58	4	it was being identified in specific terms in monetary	14:53:15	4	MR. WALKER: Objection. Lack of foundation.
14:47:04	5	notice to Meridian so that Meridian would have the	14:53:17	5	THE WITNESS: There is a summary that we just
14:47:07	6	information as to what the cost of their new facility	14:53:21	6	looked at that showed the growth of the final cost
14:47:08	7	was doing.	14:53:26	7	estimate over a -- on various dates as the project
14:47:10	8	Q. All right. Turning your attention, if you	14:53:28	8	became more and more defined.
14:47:33	9	would, please, to Exhibit No. 2 in that same binder.	14:53:30	9	Q. (BY MR. TROUT) Well, turning your attention
14:47:33	10	A. I'm there.	14:53:35	10	to Exhibit No. 10 in the notebook in front of you.
14:48:02	11	Q. Okay. And directing your attention to page	14:53:43	11	A. Yes, sir. I'm there.
14:48:06	12	10 of the Construction Management Agreement, which is	14:53:46	12	Q. All right. Can you tell me which of these
14:48:42	13	Bates numbered CM002696.	14:53:51	13	items you contend is the final cost estimate?
14:48:42	14	A. I am there.	14:53:59	14	A. Probably the one closest to the actual price
14:48:48	15	Q. All right, sir. And directing your	14:54:06	15	of the building for Meridian would be the one prepared
14:48:54	16	attention to paragraph 4.5.9. If you would read that	14:54:09	16	in July of '07.
14:49:00	17	silently to yourself and then signify for me when you	14:54:12	17	Q. All right. July 12th?
14:49:02	18	are done.	14:54:16	18	A. July 12th, 2007.
14:50:02	19	A. All right. I have read it.	14:54:27	19	Q. Okay. So would I be correct in
14:50:05	20	Q. All right, sir. Based on your reading of	14:54:34	20	understanding based upon your professional review of
14:50:12	21	paragraph 4.5.9 of Exhibit No. 2, would I be correct	14:54:42	21	this project that the July 12th, 2007, column on
14:50:15	22	in understanding that Petra had the responsibility for	14:54:46	22	Exhibit No. 10 is Petra's final cost estimate?
14:50:21	23	preparing a final cost estimate?	14:54:49	23	MR. WALKER: Objection. Lack of foundation.
14:50:34	24	A. They had the obligation to prepare the final	14:54:51	24	THE WITNESS: I don't know whether it's their
14:50:41	25	cost estimate detailed and divided into bid packages	14:54:59	25	final estimate, but is closer to the final cost of the
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14:55:04 1 building than -- or the facility than any that I had  
 14:55:19 2 seen prior to that.  
 14:55:21 3 Q. (BY MR. TROUT) All right. So if Petra  
 14:55:25 4 represented to the City of Meridian that the figures  
 14:55:40 5 contained in the column dated 7/12/2007 were the  
 14:55:54 6 highest cost estimate or the highest costs that the  
 14:55:58 7 City would be looking at for this project, would you  
 14:56:02 8 have any reason to disagree with Petra's assessment as  
 14:56:04 9 of that date?  
 14:56:05 10 MR. WALKER: Objection. Calls for speculation  
 14:56:10 11 and lacks foundation. It is also compound.  
 14:56:13 12 MR. TROUT: Yeah. I'll ask it in a couple of  
 14:56:41 13 different ways. That's for sure.  
 14:56:46 14 Q. (BY MR. TROUT) Mr. Lemley, let me ask it  
 14:57:08 15 this way: With respect to the column identified as  
 14:57:16 16 July 12th, 2007, on Exhibit No. 10, in your opinion as  
 14:57:22 17 the construction management professional that reviewed  
 14:57:31 18 this document on behalf of Petra, did the City have a  
 14:57:38 19 right to rely on Petra's representations as to cost as  
 14:57:41 20 of July 12th, 2007?  
 14:57:45 21 MR. WALKER: Objection. Calls for a legal  
 14:57:45 22 conclusion.  
 14:57:48 23 THE WITNESS: When you say, relies on, for what  
 14:57:49 24 purpose?  
 14:57:52 25 Q. (BY MR. TROUT) To believe whether it was

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14:59:46 1 right to rely on it in terms of internal discussions  
 14:59:56 2 within the city government and the building committee.  
 15:00:01 3 I don't think that because of these open items that  
 15:00:07 4 they would have been well disposed to take the 20  
 15:00:12 5 million to the bank unless they added another 2  
 15:00:18 6 million to it. I hope that the Meridian City  
 15:00:26 7 government understands these numbers better than I do.  
 15:00:26 8 MR. TROUT: Okay.  
 15:00:31 9 Q. (BY MR. TROUT) Well, let me ask you this:  
 15:00:44 10 With respect to the items exclusively in the 7/12/2007  
 15:00:50 11 column -- all right, sir?  
 15:00:52 12 A. Yes, I heard you.  
 15:00:56 13 Q. With respect to only those items, if a  
 15:01:05 14 representative of Petra told the City Council in open  
 15:01:11 15 session at a meeting of the City Council that this set  
 15:01:20 16 of numbers, "Is the highest budget that we could think  
 15:01:28 17 of inclusive of all of the items," did the City have a  
 15:01:30 18 right to rely on that statement?  
 15:01:32 19 MR. WALKER: Objection. Calls for a legal  
 15:01:35 20 conclusion, and asked and answered.  
 15:01:42 21 THE WITNESS: I said that if I were the City  
 15:01:53 22 fathers, I would want to have a -- the column that  
 15:02:02 23 said, variance to budget, clear before I settled on a  
 15:02:05 24 number of 20 million.  
 15:02:06 25 MR. TROUT: All right.

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14:57:53 1 true or not.  
 14:57:55 2 MR. WALKER: Objection. Argumentative.  
 14:57:57 3 Q. (BY MR. TROUT) For the truth that was  
 14:58:01 4 represented in this document to the City.  
 14:58:03 5 MR. WALKER: Objection. Lack of foundation.  
 14:58:10 6 THE WITNESS: Well, they might have been able to  
 14:58:20 7 rely on it for an internal planning purposes, but not  
 14:58:25 8 necessarily to go to their bankers with.  
 14:58:26 9 MR. TROUT: Okay.  
 14:58:29 10 Q. (BY MR. TROUT) Why not? Why couldn't they  
 14:58:33 11 take this to their bankers and say, this is what our  
 14:58:37 12 construction management professional tells us the  
 14:58:42 13 final cost estimate is going to be as of July 12th,  
 14:58:44 14 2007?  
 14:58:46 15 MR. WALKER: Objection. Lack of foundation.  
 14:58:49 16 THE WITNESS: Well, there is obviously some open  
 14:58:57 17 items in the column immediately adjacent to the July  
 14:59:02 18 12th, 2007, column that if I'm to believe the number  
 14:59:06 19 at the bottom of the page, would add another  
 14:59:23 20 \$2,272,437 to the \$20,457,747.  
 14:59:26 21 Q. (BY MR. TROUT) Did the City have a right to  
 14:59:32 22 rely on the number in the columns dated 7/12/2007?  
 14:59:35 23 MR. WALKER: Objection. Calls for a legal  
 14:59:36 24 conclusion.  
 14:59:39 25 THE WITNESS: Well, I believe that they had a

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15:02:12 1 Q. (BY MR. TROUT) Well, let me ask you the  
 15:02:18 2 question in a slightly different way. If you were  
 15:02:21 3 standing in front of the City Council and you handed  
 15:02:26 4 them the column of numbers in Exhibit No. 10 that is  
 15:02:33 5 represented by the July 12th, 2007, column, and you  
 15:02:38 6 said to the City, what we have attempted to do with  
 15:02:41 7 this budget is to give at us the highest budget that  
 15:02:48 8 we could think of inclusive of all of the items, would  
 15:02:52 9 you expect them to believe you and rely on you as the  
 15:02:54 10 construction management professional?  
 15:02:55 11 MR. WALKER: Objection. Compound.  
 15:03:00 12 THE WITNESS: Well, I would expect them to rely  
 15:03:07 13 on me, but all of that would have to be weighed  
 15:03:14 14 against how much credibility the construction manager  
 15:03:18 15 had from the beginning of their services until the day  
 15:03:22 16 that I stood there.  
 15:03:24 17 Q. (BY MR. TROUT) Well, let's assume for a  
 15:03:28 18 moment you had 100 percent credibility. Would the  
 15:03:32 19 City Council be able to rely on your words that this  
 15:03:36 20 was the highest budget you could think of inclusive of  
 15:03:42 21 all of the items as contained in the 7/12/2007 column?  
 15:03:51 22 A. With the exception of clearing that column  
 15:03:52 23 immediately adjacent to the right.  
 15:03:56 24 Q. Is your answer, yes, then?  
 15:03:56 25 MR. WALKER: Objection. Asked and answered.

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15:04:04	1	THE WITNESS: I said I would qualify it until I	15:06:53	1	all the core and shell; correct?
15:04:07	2	had it completely clear that all of these variances	15:06:53	2	A. Yes.
15:04:12	3	were cleared out of the budget, whether they were	15:06:58	3	Q. And as of July 12th, 2007, the Phase III
15:04:17	4	additive or subtractive to the numbers in the July	15:07:02	4	bids were in, isn't that correct?
15:04:29	5	12th, 2007, budget. And it looks to me like there	15:07:03	5	A. That is correct.
15:04:31	6	might be an addition of 2 million plus.	15:07:27	6	(Deposition Exhibit No. 92 marked.)
15:04:35	7	Q. (BY MR. TROUT) Okay. So let me direct your	15:07:31	7	Q. (BY MR. TROUT) Sir, I'm going to hand you
15:04:41	8	attention to Exhibit No. 10, and let's look at the	15:07:45	8	what's been marked as Exhibit No. 92 for
15:04:43	9	variance to budget column that you are speaking of.	15:07:45	9	identification.
15:04:44	10	All right?	15:07:46	10	A. Yes, sir.
15:04:44	11	A. Yes, sir.	15:07:48	11	Q. Do you recognize that document?
15:04:51	12	Q. Okay. In the construction management and	15:07:49	12	A. I don't, no.
15:04:58	13	site development costs, the third item is reimbursable	15:07:52	13	Q. Okay. I'll represent to you that this is
15:04:59	14	construction; correct?	15:08:00	14	Petra's takeoff of the Phase III tenant improvements
15:05:00	15	A. The third item?	15:08:04	15	and mechanical and electrical plumbing bids comprised
15:05:02	16	Q. Yes.	15:08:10	16	in Phase III all dated for the bid opening July 12th,
15:05:03	17	A. Yes.	15:08:11	17	2007.
15:05:08	18	Q. And in the variance column, it says, zero?	15:08:12	18	A. Yes.
15:05:08	19	A. Right.	15:08:14	19	Q. Does that look consistent with the document
15:05:12	20	Q. So we wouldn't worry about that, would we?	15:08:16	20	you are seeing, sir?
15:05:12	21	A. No.	15:08:16	21	A. Yes.
15:05:14	22	Q. And the fourth item in the construction	15:08:29	22	Q. All right. So as of July 12th, 2007, Petra
15:05:19	23	management and site development costs is construction	15:08:34	23	knew what the bids were for Phase II core and shell;
15:05:19	24	management fee.	15:08:37	24	correct?
15:05:20	25	Do you see that, sir?	15:08:39	25	MR. WALKER: Objection. Lack of foundation.
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15:05:21	1	A. Yes.	15:08:41	1	THE WITNESS: It appears that way.
15:05:24	2	Q. And if we go to the variance to budget, it	15:08:44	2	Q. (BY MR. TROUT) It certainly appears that
15:05:26	3	says, zero; correct?	15:08:48	3	way from Exhibit No. 10, doesn't it, sir?
15:05:26	4	A. Yes.	15:08:49	4	A. Yes.
15:05:30	5	Q. So we wouldn't worry about that as an issue,	15:08:53	5	Q. So as of, frankly, the date of the bid
15:05:31	6	would we?	15:09:00	6	opening, April 3rd, 2007, Petra certainly knew all of
15:05:41	7	A. No. Not if everything had been tidied up in	15:09:03	7	the costs that were going to be included in core and
15:05:44	8	the change order areas, we wouldn't worry about it.	15:09:07	8	shell according to the bid opening?
15:05:51	9	But if it hadn't been, we would view that with some	15:09:09	9	A. Yes.
15:05:51	10	skepticism.	15:09:14	10	Q. All right. And that would include
15:05:55	11	Q. Well, there weren't any change orders on the	15:09:16	11	structural steel, wouldn't it?
15:06:01	12	table as of 7/12/2007, were there, Mr. Lemley?	15:09:17	12	A. Yes.
15:06:02	13	MR. WALKER: Objection. Lack of foundation.	15:09:20	13	Q. And that would include the exterior cladding
15:06:05	14	THE WITNESS: I'll take your word for it.	15:09:24	14	of stone and brick, wouldn't it?
15:06:06	15	MR. TROUT: All right.	15:09:25	15	A. I'm looking for it.
15:06:13	16	Q. (BY MR. TROUT) Well, in your review of this	15:10:05	16	Q. Okay.
15:06:20	17	project on behalf of Mr. Walker and Cosho, did you	15:10:08	17	A. Well, it includes all of the core and shell,
15:06:25	18	find any change orders submitted by Petra as of July	15:10:09	18	yes.
15:06:28	19	12th, 2007?	15:10:12	19	Q. All right. And, of course, in order to know
15:06:29	20	A. I don't believe so, no.	15:10:20	20	the core and shell numbers, you would have to know the
15:06:35	21	Q. All right. And as of July 12th, 2007, the	15:10:23	21	physical size of the project that was placed out for
15:06:43	22	Phase II bids were actually in on April 3rd, 2007;	15:10:29	22	bid as of April, 3rd, 2007; correct?
15:06:44	23	correct?	15:10:29	23	A. Yes.
15:06:45	24	A. Yes.	15:10:41	24	Q. All right. And by way of the description in
15:06:49	25	Q. And as of July 12th -- and Phase II included	15:10:49	25	Exhibit No. 92, Petra would have known of all of the
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15:10:55 1 tenant improvements or scope of work within the  
 15:10:59 2 building as of July 12th, 2007; correct?  
 15:11:01 3 A. I would think so, yes.  
 15:11:06 4 Q. All right. And Petra had estimated in  
 15:11:12 5 Exhibit No. 10 the plaza and site work, which was bid  
 15:11:20 6 Phase IV as contained in the July 12th, 2007, column  
 15:11:23 7 on Exhibit No. 10, isn't that correct?  
 15:11:31 8 A. It sure appears that way, yes.  
 15:11:39 9 Q. All right. And so as of the Phase II bids,  
 15:11:45 10 April 3rd, 2007, Petra certainly would have been aware  
 15:11:51 11 of the steel required for the City Council chambers as  
 15:11:54 12 identified in the core and shell documents; correct?  
 15:11:59 13 A. It certainly is logical, yes.  
 15:12:02 14 Q. All right. And as of that same date, April  
 15:12:07 15 3rd, 2007, Petra would have been aware of the stone  
 15:12:11 16 and brick used in the exterior cladding for the  
 15:12:13 17 building as part of the Phase II core and shell  
 15:12:15 18 documents; correct?  
 15:12:15 19 A. Yes.  
 15:12:20 20 Q. And as of July 12th, 2007, Petra would have  
 15:12:25 21 been fully aware of the mechanical system as contained  
 15:12:30 22 in the Phase III bids; correct?  
 15:12:32 23 A. I believe that's correct, yes.  
 15:12:37 24 Q. And as of July 12th, 2007, Petra would have  
 15:12:41 25 been fully aware of the electrical system contained in

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15:14:40 1 A. Yes. That's correct.  
 15:14:43 2 Q. And there is zero variance shown in the  
 15:14:45 3 variance column; correct?  
 15:14:45 4 A. That's correct.  
 15:14:48 5 Q. And if we go down a little further, we have  
 15:14:54 6 the Phase III general conditions budget, same number,  
 15:14:57 7 181,029; correct?  
 15:14:57 8 A. That's correct.  
 15:15:02 9 Q. And in the variance column, we have a zero,  
 15:15:03 10 isn't that correct?  
 15:15:03 11 A. Yes.  
 15:15:26 12 Q. Okay. So if I look at the Exhibit No. 92 in  
 15:15:34 13 conjunction with Exhibit No. 10, as a construction  
 15:15:44 14 management professional, wouldn't I be correct that as  
 15:15:51 15 of July 12th, 2007, Petra knew of all of the  
 15:15:59 16 components that we've just spoken about and placed  
 15:16:05 17 them into the final cost estimate for that date, July  
 15:16:08 18 12th, 2007?  
 15:16:08 19 A. Yes.  
 15:16:24 20 MR. TROUT: All right. Let's go off the record  
 15:16:25 21 for just a moment.  
 15:16:27 22 (Off the record.)  
 15:16:59 23 MR. TROUT: Back on the record.  
 15:17:49 24 Q. (BY MR. TROUT) Mr. Lemley, in your work as  
 15:17:58 25 a construction management professional, if I am a

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15:12:47 1 the Phase III MEP bids, isn't that correct?  
 15:12:51 2 A. I believe so. I have no specific knowledge  
 15:12:54 3 of that other than what is represented here.  
 15:12:58 4 Q. All right, sir. But, again, turning your  
 15:13:04 5 direction -- or attention to Exhibit No. 92, it says,  
 15:13:10 6 Meridian City Hall project Phase III TI -- TI means  
 15:13:12 7 tenant improvements?  
 15:13:13 8 A. Yes, I understand that.  
 15:13:17 9 Q. And MEP means mechanical electrical and  
 15:13:19 10 plumbing, isn't that correct?  
 15:13:19 11 A. That's correct.  
 15:13:24 12 Q. All right. And as of July 12th, 2007, if we  
 15:13:36 13 look in the column marked 7/12/2007, and we go down to  
 15:13:39 14 the construction costs, we have a LEED certification  
 15:13:47 15 cost shown in that column of \$205,000; correct?  
 15:13:59 16 A. Yes, it is.  
 15:14:02 17 Q. All right. And in that same column, we have  
 15:14:07 18 two line items, one is for Phase II, general  
 15:14:14 19 conditions budget, 181,029; correct?  
 15:14:18 20 A. This is in the variance column?  
 15:14:24 21 Q. No, sir. In the Phase III bids 7/12/2007  
 15:14:29 22 column.  
 15:14:30 23 A. Yes. Okay.  
 15:14:33 24 Q. Construction costs, item 1(a), Phase II  
 15:14:40 25 general conditions budget, 181,029.

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15:18:06 1 contractor and I make a request to you for a change  
 15:18:20 2 order, does all of my original scope of work have to  
 15:18:26 3 be completed before I am entitled to have you process  
 15:18:27 4 my change order?  
 15:18:28 5 A. No.  
 15:18:31 6 Q. Why not?  
 15:18:34 7 A. If your original scope of work doesn't  
 15:18:38 8 relate to the change order, there would be no reason  
 15:18:44 9 to process the change order ahead of finishing your  
 15:18:47 10 original scope of work.  
 15:18:52 11 Q. What if the change order relates to my  
 15:19:01 12 original scope of work, am I entitled to have that  
 15:19:05 13 processed before my original scope of work is fully  
 15:19:06 14 complete?  
 15:19:10 15 A. If it is tied totally to your original scope  
 15:19:15 16 of work, you would have every right to expect the  
 15:19:19 17 change order to be processed, but not necessarily  
 15:19:25 18 finalized and paid until your original scope of work  
 15:19:37 19 was done. Or if you were a long way behind schedule  
 15:19:40 20 with your scope of work, they may not process it at  
 15:19:41 21 all and might terminate you.  
 15:19:43 22 Q. Sure. If I wasn't performing, you would  
 15:19:48 23 have every right to terminate me, isn't that correct?  
 15:19:52 24 A. Yes. For breach of contract.  
 15:20:06 25 Q. In your experience, sir, is termination a

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36 (Pages 141 to 144)

15:20:12 1 severe remedy?

15:20:15 2 A. Yes. It is a severe remedy, and there are

15:20:21 3 several variations of termination, termination for

15:20:24 4 cause or termination for convenience, both of which

15:20:27 5 carry a completely different connotation.

15:20:31 6 Q. What's termination for cause in your

15:20:34 7 experience as a construction manager?

15:20:40 8 A. If a contractor demonstrates that he is not

15:20:46 9 able to complete the work that he contracted to do, or

15:20:55 10 if he walks off the project and he has been paid in

15:21:01 11 accordance with the contract, then he would be

15:21:16 12 susceptible to be terminated for cause.

15:21:25 13 Q. What's force account work?

15:21:29 14 A. It's doing work on a project on the basis of

15:21:33 15 time and materials where the contractor is paid for

15:21:48 16 all of his cost, plus a profit on his cost, normally.

15:21:55 17 That's force account work. In the first instance,

15:22:00 18 it's always best to try to get a price from the

15:22:07 19 contractor for the given work, but if that can't be

15:22:12 20 achieved, it might be better to put him on a time and

15:22:13 21 material basis.

15:22:17 22 Q. When is it appropriate in your experience to

15:22:23 23 use a force account basis for having a contractor

15:22:26 24 perform work?

15:22:38 25 A. When you have unexpected work that develops

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15:24:22 1 A. Well, it would depend on the work. If you

15:24:32 2 were going to put a roof on a building, you would need

15:24:39 3 the detail as to how the roofing material got to the

15:24:45 4 place where it had to be installed, and then the

15:24:47 5 cleaning of the area that it was going to be installed

15:24:55 6 on, and then as the materials started to be installed,

15:25:00 7 the various hours of the crew that were working on

15:25:09 8 laying it out and the other activity where people were

15:25:13 9 welding it together in the case of these new fabric

15:25:17 10 materials.

15:25:20 11 Q. And if I submitted a timecard to you that

15:25:27 12 simply said, roof work, eight hours, would you accept

15:25:28 13 that?

15:25:28 14 A. No.

15:25:30 15 Q. Why not?

15:25:33 16 A. Not sufficient detail -- insufficient

15:25:33 17 detail.

15:25:53 18 Q. Okay. Turning your attention again to your

15:26:16 19 report -- before I move onto a different area. When

15:26:19 20 you said, insufficient detail, with respect to my

15:26:23 21 description of a timecard that said, roof work, eight

15:26:27 22 hours, why is that insufficient in your opinion?

15:26:32 23 A. Because it doesn't give me the detail as to,

15:26:38 24 one, what was actually done to replace or repair the

15:26:45 25 roof. And that's the most fundamental thing you need

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15:22:39 1 that requires immediate attention.

15:22:42 2 Q. Okay. What kind of accounting is required

15:22:46 3 from a contractor who is doing work under a force

15:22:47 4 account?

15:22:51 5 A. He should have a specific cost code that he

15:22:58 6 charges all of his costs to and have it as an open

15:23:01 7 record of what he has spent to accomplish the work.

15:23:06 8 Q. What kind of documentation do you consider

15:23:10 9 necessary and appropriate with respect to force

15:23:17 10 account work involving labor?

15:23:23 11 A. Timecards and a certified payroll, and if

15:23:30 12 there is subcontractor involvement, a certified

15:23:33 13 payment to the subcontractor but with the same

15:23:34 14 documentation.

15:23:39 15 Q. What kind of particularity would you require

15:23:43 16 the timecards to have as it relates to the scope of

15:23:46 17 the force account work?

15:23:51 18 A. I would expect the timecard to have on it

15:23:55 19 the proper coding, and have it signed by, first, the

15:24:00 20 employee, and second, by the supervisor.

15:24:03 21 Q. What level of detail would you expect in

15:24:05 22 that timecard?

15:24:08 23 A. I would require -- I would expect a good

15:24:09 24 level of detail.

15:24:15 25 Q. What's a good level of detail, sir?

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15:26:48 1 to know, is that the work steps that needed to be

15:26:50 2 taken were taken.

15:27:02 3 Q. All right. So if I understand your

15:27:04 4 testimony correctly, you would require as a

15:27:06 5 construction manager a particularized identification

15:27:10 6 of the activities that were being performed in order

15:27:13 7 to provide sufficient detail for the timecard we just

15:27:14 8 discussed?

15:27:14 9 A. Yes.

15:27:23 10 Q. All right.

15:27:26 11 A. Now, the way I've done that in the past is

15:27:34 12 to use numeric codes that did all of the above.

15:28:30 13 Q. I understand. Sir, if you would turn,

15:28:38 14 please, to Exhibit No. 5 in the notebook in front of

15:28:40 15 you.

15:28:50 16 A. Yes, sir. I guess I'm there.

15:28:55 17 Q. All right. And within Exhibit No. 5, which

15:29:01 18 is the construction management plan prepared by Petra,

15:29:41 19 could you please turn to page Bates No. CM017077.

15:29:44 20 A. I'm there. It is an organogram.

15:29:48 21 Q. No, sir. I'm looking for the document that

15:29:51 22 I'm holding in my hand and showing you and it's

15:29:59 23 CM017077.

15:30:10 24 A. Oh. I'm missing a zero -- 170 --

15:30:27 25 Q. Yes, sir. 17077.

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37 (Pages 145 to 148)



15:30:49 1 A. Okay. I think I'm there.  
 15:30:57 2 Q. Okay. Sir, I'll represent to you that this  
 15:31:07 3 document appears to be a document prepared by Petra,  
 15:31:16 4 which reflects the Phase II general conditions for the  
 15:31:24 5 project; is that your understanding?  
 15:31:34 6 A. The Phase II shell.  
 15:31:37 7 Q. And I'm drawing my understanding in the  
 15:31:42 8 following way, Mr. Lemley: If you see -- in the upper  
 15:31:45 9 right hand corner you're going to see a division total  
 15:31:51 10 of 189,029.  
 15:31:52 11 A. Yes. I see that.  
 15:31:56 12 Q. And I'll represent to you that that  
 15:32:04 13 correlates to the Phase II general conditions which we  
 15:32:11 14 identified in the July 12th, 2007, final cost estimate  
 15:32:15 15 that was Exhibit No. 10.  
 15:32:16 16 Do you recall that?  
 15:32:23 17 A. Yes, I do.  
 15:32:28 18 Q. Now, in this breakdown, which is a part of  
 15:32:35 19 Exhibit No. 5, we have a number of categories, for  
 15:32:38 20 example, we have clean up; correct?  
 15:32:38 21 A. Yes, sir.  
 15:32:42 22 Q. Testing and inspection; correct?  
 15:32:43 23 A. Yes.  
 15:32:49 24 Q. Temporary utilities?  
 15:32:50 25 A. Yes.

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15:32:53 1 Q. And then we have a category, which is the  
 15:32:59 2 sixth item down called, safety?  
 15:32:59 3 A. Yes, sir.  
 15:33:05 4 Q. What is the category safety in general  
 15:33:09 5 conditions based on your professional experience?  
 15:33:25 6 A. It would involve signage and hard hats,  
 15:33:27 7 safety belts, and that sort of thing.  
 15:33:31 8 Q. In your experience as a construction manager  
 15:33:37 9 should all of the anticipated safety costs be gathered  
 15:33:43 10 into this general condition category?  
 15:33:47 11 A. Well, I think it's a reasonable way to keep  
 15:33:58 12 track of it and understand what is being spent on  
 15:34:01 13 safety, and then you can make a judgment as to whether  
 15:34:03 14 it's reasonable or not.  
 15:34:07 15 Q. Okay. So maybe I need to ask my question in  
 15:34:12 16 a different way. Is this an appropriate way as a  
 15:34:16 17 construction manager to capture all of the costs  
 15:34:18 18 related to safety?  
 15:34:23 19 A. It won't capture all of the costs, because  
 15:34:26 20 your general contractors are going to be carrying a  
 15:34:31 21 significant amount of cost as they do their work, and  
 15:34:37 22 they will have a safety responsibility right along  
 15:34:41 23 side the owner and the construction manager.  
 15:34:45 24 Q. All right. But is this the correct way to  
 15:34:54 25 capture all of the safety costs for the owner?

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15:34:58 1 A. I would assume behind each of these  
 15:35:06 2 categories security, safety review consultant, safety,  
 15:35:09 3 material, and labor, and signage, there would be  
 15:35:10 4 details.  
 15:35:13 5 Q. Okay.  
 15:35:18 6 A. And that would be a proper way to keep track  
 15:35:18 7 of these.  
 15:35:37 8 Q. Okay. So in your report --  
 15:35:41 9 THE WITNESS: May I take a short break, please?  
 15:35:48 10 MR. TROUT: Sure. Absolutely. Go off the  
 15:35:48 11 record.  
 15:42:21 12 (Recess taken from 3:35 p.m. to 3:42 p.m.)  
 15:42:24 13 MR. TROUT: Back on the record in the deposition  
 15:42:38 14 of Mr. Lemley.  
 15:42:52 15 Q. (BY MR. TROUT) Sir, we were talking about  
 15:42:56 16 general conditions, and we were talking about the  
 15:42:57 17 safety category.  
 15:42:58 18 A. Yes.  
 15:43:00 19 Q. I'd like to turn your attention, if we  
 15:43:10 20 could, sir, to the category called protection.  
 15:43:11 21 Do you see that?  
 15:43:13 22 A. Yes.  
 15:43:21 23 Q. There is a subset of that category called  
 15:43:24 24 weather protection and heating.  
 15:43:25 25 A. Yes.

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15:43:28 1 Q. What is that category?  
 15:43:32 2 A. Well, I imagine it is just exactly what it  
 15:43:38 3 says, protection from the weather, and heat -- keeping  
 15:43:44 4 heat in the area that is being protected so that the  
 15:43:51 5 work will not be damaged by freezing, or in the  
 15:43:58 6 alternative that the people working in the area will  
 15:44:03 7 be warmer and the productivity will be better.  
 15:44:08 8 Q. Okay. Would that category, as you've just  
 15:44:11 9 described it, also be known in the construction  
 15:44:14 10 industry as winter conditions?  
 15:44:16 11 A. Well, it could be, yes.  
 15:44:21 12 Q. All right. And would the phrase, winter  
 15:44:25 13 conditions, as I have just used it, be consistent with  
 15:44:29 14 your understanding of what weather protection and  
 15:44:32 15 heating would normally be used for?  
 15:44:33 16 A. Yes.  
 15:44:47 17 Q. All right. And is the accumulation of the  
 15:44:52 18 winter conditions costs in the protection category  
 15:44:52 19 something that you would consider ordinary and  
 15:44:54 20 appropriate in the construction industry for the kind  
 15:45:02 21 of project we have at the Meridian City Hall project?  
 15:45:05 22 A. I would if the work could not have been done  
 15:45:08 23 prior to the time that weather protection wasn't  
 15:45:10 24 required and heating required.  
 15:45:13 25 Q. Okay.

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15:45:17	1	A. And it would -- after that, it would depend	15:50:43	1	fresh water, electricity, temporary electricity.
15:45:24	2	on whose responsibility it was that the work got laid	15:50:44	2	Those are job conditions.
15:45:30	3	into a period where the weather was adverse to the	15:50:56	3	Q. Are those the items which are identified on
15:45:30	4	production.	15:51:00	4	Exhibit No. 5 in front of you in that first set of
15:45:41	5	Q. Okay. And if there was a contractor whose	15:51:01	5	categories?
15:45:50	6	work was in the critical path and necessary to be done	15:51:02	6	A. The first set of categories?
15:45:57	7	so that other work could be performed before the	15:51:06	7	Q. And I didn't ask that very clearly, so let
15:46:05	8	necessity of winter protection, and his work was	15:51:22	8	me change my question. For example, on page CM017077,
15:46:11	9	delayed, would it be appropriate to charge that	15:51:25	9	we have temporary utilities; correct?
15:46:14	10	contractor for winter protection or winter conditions	15:51:25	10	A. Yes.
15:46:16	11	costs?	15:51:29	11	Q. And that's a job condition as you've just
15:46:22	12	A. The contractor that delayed the next	15:51:30	12	described it?
15:46:24	13	contractor?	15:51:30	13	A. Yes.
15:46:27	14	Q. Yes, sir. Is that how you appropriately	15:51:35	14	Q. All right. In the next category, materials
15:46:31	15	allocate costs for delay in your experience?	15:51:44	15	and supplies, we have supplies and postage. That's a
15:46:39	16	A. In my experience, a delay -- cost for	15:51:47	16	job condition; correct?
15:46:45	17	delay --	15:51:49	17	A. And certainly drinking water.
15:46:45	18	(Cell phone ringing.)	15:51:53	18	Q. All right. And we also have things like
15:46:45	19	THE WITNESS: Pardon me.	15:51:58	19	plan reproduction, schedule plotting and printing;
15:46:45	20	MR. TROUT: That's all right, sir.	15:51:59	20	correct?
15:46:45	21	THE WITNESS: That will handle that.	15:51:59	21	A. Yes.
15:46:48	22	MR. TROUT: If you need to take that call, we are	15:52:07	22	Q. Those are all job conditions, am I correct
15:46:51	23	more than happy to do that.	15:52:08	23	in understanding that?
15:46:55	24	THE WITNESS: It is my wife. She'll give me hell	15:52:08	24	A. Yes.
15:46:56	25	tonight, but let's get on with it.	15:52:14	25	Q. And then if we turn back to Exhibit No. 91,
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15:46:56	1	MR. TROUT: Okay. I interrupted your answer --	15:52:16	1	which is your report --
15:46:56	2	or the phone did. Would you finish, sir?	15:52:16	2	A. Yes, sir.
15:47:02	3	THE WITNESS: It would depend on whose fault the	15:52:26	3	Q. -- and we turn to page 5 of 12, you created
15:47:09	4	first contractor was in not getting his work done to	15:52:34	4	a list of examples of job conditions which contained
15:47:13	5	the point the second contractor could carry on his	15:52:43	5	toilets, temporary water, trash service, clean up,
15:47:13	6	work.	15:52:46	6	temporary power, weather protection, printing and
15:47:15	7	Q. (BY MR. TROUT) If the responsibility for	15:52:47	7	safety; correct?
15:47:23	8	delay was solely attributable to the first contractor,	15:52:47	8	A. Yes, sir.
15:47:27	9	in your experience would it be appropriate to charge	15:52:51	9	Q. Now, the weather protection would actually
15:47:32	10	the additional costs of the second contractor for	15:52:59	10	be broken out on Exhibit No. 5 in a separate category
15:47:56	11	dealing with weather -- I'll start again --	15:53:03	11	called protection -- weather protection and heating;
15:47:59	12	A. I think I understand where you are at, and I	15:53:04	12	correct?
15:48:03	13	would say, yes, if the first contractor didn't perform	15:53:04	13	A. That's correct.
15:48:11	14	up to expectations and the schedule that he	15:53:09	14	Q. Okay. And so am I correct in understanding
15:48:17	15	understood, then I think he would be in line to be	15:53:16	15	that all of those items should have been captured in
15:48:23	16	liable for the subsequent work that fell into the	15:53:22	16	the general conditions costs, which are shown in
15:49:19	17	inclement weather.	15:53:32	17	Exhibit No. 5, which total 181,029; correct?
15:49:24	18	Q. All right. So with respect to Exhibit	15:53:43	18	A. Yes.
15:50:12	19	No. 5, we also have -- well, let me ask it in a	15:54:17	19	Q. All right. Is there anything else that you
15:50:17	20	slightly different way. Are you familiar with the	15:54:26	20	consider to be a job condition that isn't listed in
15:50:21	21	term, job conditions?	15:54:35	21	your categories on page 5 of 12 in Exhibit No. 91?
15:50:22	22	A. Yes.	15:54:39	22	A. No. There is one thing that we ought to be
15:50:25	23	Q. What does that phrase mean?	15:54:46	23	clear on. I'm calling these general conditions, not
15:50:30	24	A. It's the conditions that are required to	15:54:51	24	job conditions. And --
15:50:35	25	support the job operation such as toilet facilities,	15:54:55	25	Q. Is there some difference between the phrase
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15:54:57 1 general conditions and the phrase job conditions in  
 15:54:58 2 your experience?  
 15:55:01 3 A. Well, I think there is, yes.  
 15:55:02 4 Q. And what's the difference?  
 15:55:06 5 A. Well, I think the general conditions are a  
 15:55:13 6 little bit more broad and might even include some  
 15:55:20 7 insurances, but I can't add to the list that's in my  
 15:55:30 8 report, and it's fairly close to the Petra break out.  
 15:55:35 9 Q. So would I be fair in stating that what you  
 15:55:41 10 have described in your list on page 5 of 12 in your  
 15:55:50 11 report is reasonably included in the list of general  
 15:55:54 12 conditions which is identified in Exhibit No. 5, which  
 15:55:56 13 is the Petra document?  
 15:55:56 14 A. Yes.  
 15:56:44 15 Q. Okay. As part of your work, sir, did you  
 15:56:48 16 examine a document called a building program that was  
 15:56:56 17 prepared by Lombard-Conrad architects?  
 15:56:56 18 A. I did not.  
 15:57:02 19 Q. Okay. So I would be correct in  
 15:57:06 20 understanding that any building program prepared by  
 15:57:14 21 Lombard-Conrad architects did not have anything to do  
 15:57:17 22 with the opinions of Lemley International that were  
 15:57:21 23 provided in this case?  
 15:57:25 24 A. It would be coincidental if they appear to.  
 15:57:32 25 I had no access to Lombard-Conrad's building program.

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16:00:22 1 Q. All right.  
 16:00:25 2 A. But it's been such a pleasant day.  
 16:01:39 3 Q. It has indeed. Where would I find something  
 16:01:46 4 that you believe is a generally accepted definition  
 16:01:53 5 for Class A office space?  
 16:02:00 6 A. Well, I think the Means estimating manuals  
 16:02:04 7 would do as much towards describing that as anything I  
 16:02:05 8 know of.  
 16:02:08 9 Q. Anything else?  
 16:02:10 10 A. Not that I can recall right now.  
 16:02:19 11 Q. Are you familiar with any resource within  
 16:02:27 12 the state of Idaho that defines Class A office space?  
 16:02:31 13 A. Not unless a commercial real estate office  
 16:02:33 14 could provide that.  
 16:02:38 15 Q. Okay. Is defining a Class A office space  
 16:02:45 16 outside the scope of your purview as a construction  
 16:02:46 17 manager?  
 16:02:49 18 A. Yes, it is. If you want to know how to  
 16:02:52 19 build a tunnel, I would be happy to engage in  
 16:02:54 20 discussions as long as you want.  
 16:03:36 21 Q. I have no doubt about that. Turning your  
 16:03:58 22 attention to page 10 of 12 in Exhibit No. 91.  
 16:03:58 23 A. Yes, sir.  
 16:04:12 24 Q. And directing your attention to the middle  
 16:04:18 25 of page 10 of 12 on Exhibit No. 91, you provide us

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15:58:00 1 Q. All right. Let's turn to Exhibit No. 3 in  
 15:58:06 2 the book in front of you.  
 15:58:06 3 A. I'm there.  
 15:58:10 4 Q. Just so the record that we have today is  
 15:58:15 5 clear, would I be correct in understanding that you  
 15:58:21 6 did not review Exhibit No. 3 in the performance of  
 15:58:26 7 Lemley International's work on this project, the  
 15:58:27 8 Meridian City Hall?  
 15:58:28 9 A. No, I have not.  
 15:58:30 10 Q. All right.  
 15:58:35 11 A. That's the first time I've seen this.  
 15:58:52 12 Q. Okay. In the body of your report you talk  
 15:58:58 13 about the masonry contractor, TMC.  
 15:58:59 14 Do you recall that, sir?  
 15:59:00 15 A. Yes, I do.  
 15:59:14 16 Q. Okay. Were you provided with any document  
 15:59:26 17 that evidenced that TMC made a claim of any kind for  
 15:59:31 18 inefficiency related on this project?  
 15:59:33 19 A. No. I was not provided such a document.  
 16:00:02 20 Q. Okay.  
 16:00:07 21 A. I believe that I could have developed a  
 16:00:11 22 claim very nicely for them, but I was not asked to.  
 16:00:15 23 Q. Then any discussion of that would be purely  
 16:00:17 24 hypothetical; correct?  
 16:00:18 25 A. It would be, yes.

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16:04:27 1 with a direct quote from Exhibit No. 2, the  
 16:04:32 2 Construction Management Agreement, quoting paragraph  
 16:04:35 3 4.7.2; correct?  
 16:04:36 4 A. Yes.  
 16:04:39 5 Q. All right. Turning to Exhibit No. 2, if you  
 16:04:45 6 would, please, in the volume in front of you.  
 16:04:48 7 A. Yes, sir. I'm here.  
 16:04:58 8 Q. And directing your attention to paragraph  
 16:05:12 9 4.7.2. If you would turn there, please.  
 16:05:19 10 A. Okay. I am here.  
 16:05:26 11 Q. That paragraph is utilized for what phase of  
 16:05:33 12 the construction manager's duties on this project?  
 16:05:46 13 A. Well, on the actual construction and the  
 16:05:51 14 coordination of the construction contractors that were  
 16:05:56 15 engaged in the actual construction on the City Hall.  
 16:06:00 16 Q. All right. Would I be correct in  
 16:06:06 17 understanding you chose that quote directly from  
 16:06:12 18 article 4.7, which describes the activities in the  
 16:06:13 19 construction phase?  
 16:06:13 20 A. Yes.  
 16:06:18 21 Q. All right. Would you agree with me, sir,  
 16:06:24 22 that there were a number of other phases in which  
 16:06:28 23 Petra was to perform activities?  
 16:06:32 24 A. I would agree that there were other phases  
 16:06:43 25 that were referred to by reference such as

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16:06:47	1	coordinating the architect and things like that, but	16:09:34	1	interpretation. I want to know what you reviewed.
16:06:51	2	there was no privities of contract or no real	16:09:38	2	A. Well, they were the responses to the City's
16:06:54	3	authority granted Petra with regard to that.	16:09:40	3	complaint and amended complaint.
16:07:08	4	Q. Well, let's make sure we understand clearly.	16:09:43	4	Q. All right. And you indicate that you
16:07:13	5	All of article 4 describe the scope of services for	16:09:46	5	reviewed some kind of witness statement by Ted Baird.
16:07:14	6	Petra; correct?	16:09:49	6	Can you tell me what that document is?
16:07:15	7	A. Yes.	16:09:54	7	A. No, I can't. That must have been Mr. Bauer
16:07:17	8	Q. All right. And that included a general	16:09:55	8	who did that.
16:07:20	9	scope of services; correct?	16:09:58	9	Q. All right. So you didn't review a witness
16:07:20	10	A. Yes.	16:10:00	10	statement from Mr. Baird; correct?
16:07:26	11	Q. It included a development strategies phase	16:10:01	11	A. No. I did not.
16:07:28	12	scope of services; correct?	16:10:04	12	Q. Okay. It says there was a witness statement
16:07:29	13	A. Yes.	16:10:07	13	by Keith Watts that was reviewed.
16:07:32	14	Q. Site preparation phase; correct?	16:10:09	14	Did you review that document?
16:07:32	15	A. Yes.	16:10:12	15	A. No, I didn't.
16:07:36	16	Q. Preliminary design phase; correct?	16:10:12	16	Q. All right. It also says that --
16:07:38	17	A. Yes. Preconstruction phase.	16:10:13	17	A. Bennett and Frank, yes.
16:07:45	18	Q. Okay. A construction documents phase;	16:10:17	18	Q. Okay. So you reviewed the Gene Bennett
16:07:46	19	correct?	16:10:18	19	witness statement?
16:07:48	20	A. Uh-huh. Yes.	16:10:18	20	A. Yes, sir.
16:07:49	21	Q. A bidding phase?	16:10:21	21	Q. And the Jerry Frank witness statement?
16:07:50	22	A. Yes.	16:10:21	22	A. Yes, sir.
16:07:53	23	Q. And then finally a construction phase, isn't	16:10:25	23	Q. Are those the same as affidavits, is that
16:07:54	24	that correct?	16:10:33	24	what you saw, or did you see something else?
16:07:54	25	A. That's correct.	16:10:36	25	A. Well, I don't know. I'd have to go back and
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16:08:09	1	Q. Now, I looked carefully -- at least I	16:10:40	1	review the title on them. I assume they were witness
16:08:16	2	thought I did -- at the things you identified that	16:10:49	2	statements. They purported to describe the process
16:08:20	3	were reviewed as part of Lemley International's	16:10:51	3	from their perspective.
16:08:26	4	provision of an opinion in this case, which are set	16:10:53	4	Q. What process?
16:08:28	5	forth in your cover letter.	16:10:56	5	A. The process of managing the construction on
16:08:30	6	A. Yes.	16:10:58	6	the Meridian City Hall.
16:08:33	7	Q. And I want to make sure that I understand	16:11:11	7	Q. Okay. Can you identify for me the documents
16:08:40	8	those things that are identified.	16:11:14	8	that you considered to be budgets that you reviewed
16:08:44	9	It indicates that you reviewed the	16:11:22	9	within notebooks that have been marked as be Exhibit
16:08:48	10	Construction Management Agreement between the City and	16:11:25	10	Nos. 86, 87, or 88?
16:08:52	11	Petra that we've talked about today; is that correct?	16:11:29	11	A. Well, I will be able to after I re-review
16:08:52	12	A. Yes.	16:11:31	12	them, yes.
16:08:54	13	Q. And professional services agreement between	16:11:34	13	Q. Okay. Well, I'm going --
16:08:58	14	the City and Lombard-Conrad?	16:11:37	14	THE WITNESS: It's been a long day, and I'm
16:08:58	15	A. Yes.	16:11:38	15	getting tired.
16:09:01	16	Q. It indicates that you reviewed the City's	16:11:46	16	MR. TROUT: Well, sir, I don't -- my intention is
16:09:06	17	complaint and the amended complaint; correct?	16:11:51	17	not to have a marathon and not to wear you out.
16:09:06	18	A. Yes.	16:11:55	18	THE WITNESS: Well, I suspected that you weren't,
16:09:09	19	Q. And it says you reviewed Petra's responses	16:11:59	19	and I wasn't accusing you of that. I just made a
16:09:13	20	and counterclaim. Are you specifically referring to	16:12:01	20	simple statement. I'm tired.
16:09:19	21	Petra's answer and the counterclaim filed as a	16:12:02	21	MR. TROUT: All right. I can represent to you
16:09:20	22	pleading in this case?	16:12:05	22	that we aren't going to finish today, and if you --
16:09:26	23	A. Yes. It could be interpreted that way,	16:12:07	23	THE WITNESS: Well, let's make another date.
16:09:27	24	right.	16:12:11	24	MR. TROUT: All right. If you are tired, we can
16:09:31	25	Q. Well, I don't want it to be any	16:12:12	25	make another date.
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16:12:13 1 THE WITNESS: That's wonderful.  
16:12:16 2 MR. TROUT: All right. With that, we will  
16:12:21 3 adjourn for today, and I will coordinate with Counsel  
16:12:25 4 and you, sir, to make another date to continue your  
16:12:26 5 deposition.  
16:12:28 6 THE WITNESS: That will be fine, and my calendar  
16:12:35 7 is relatively free for the rest of June and early  
16:12:39 8 July, and then it starts to get jammed up.  
16:12:41 9 MR. TROUT: Okay. We will try and accommodate  
16:12:46 10 your calendar and that of everybody else involved.  
16:12:46 11 Thank you, sir.  
16:12:48 12 THE WITNESS: Thank you. I appreciate your  
16:12:49 13 courtesy.  
16:12:49 14  
16:12:49 15 (The deposition adjourned at 4:12 p.m.)  
16:12:49 16 (Signature requested.)  
16:12:49 17  
16:12:49 18  
16:12:49 19  
16:12:49 20  
16:12:49 21  
16:12:49 22  
16:12:49 23  
16:12:49 24  
16:12:49 25

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16:13:00 1 REPORTER'S CERTIFICATE  
16:13:00 2 STATE OF IDAHO )  
16:13:00 3 ) ss.  
16:13:00 4 COUNTY OF ADA )  
16:13:00 5  
16:13:00 6 I, JANET FRENCH, Certified Shorthand Reporter and  
16:13:00 7 Notary Public in and for the State of Idaho, do hereby  
16:13:00 8 certify:  
16:13:00 9 That prior to being examined, the witness named  
16:13:00 10 in the foregoing deposition was by me duly sworn to  
16:13:00 11 testify to the truth, the whole truth, and nothing but  
16:13:00 12 the truth;  
16:13:00 13 That said deposition was taken down by me in  
16:13:00 14 shorthand at the time and place therein named and  
16:13:00 15 thereafter reduced to typewriting under my direction,  
16:13:00 16 and that the foregoing transcript contains a full,  
16:13:00 17 true and verbatim record of said deposition.  
16:13:00 18 I further certify that I have no interest in the  
16:13:00 19 event of this action.  
16:13:00 20 WITNESS my hand and seal this \_\_\_\_\_ day of  
16:13:00 21 \_\_\_\_\_, 2010.  
16:13:00 22  Janet French  
16:13:00 23 JANET FRENCH,  
16:13:00 24 CSR, RPR and Notary  
16:13:00 25 Public in and for the  
16:13:00 26 State of Idaho.  
16:13:00 27 My Commission Expires: 10-28-2010

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16:13:00 1 VERIFICATION  
16:13:00 2  
16:13:00 3 STATE OF \_\_\_\_\_ )  
16:13:00 4 ) ss.  
16:13:00 5 COUNTY OF \_\_\_\_\_ )  
16:13:00 6  
16:13:00 7 I, JACK K. LEMLEY, being first duly sworn on  
16:13:00 8 my oath, depose and say:  
16:13:00 9 That I am the witness named in the foregoing  
16:13:00 10 deposition taken on the 16th day of June, 2010,  
16:13:00 11 consisting of pages numbered 1 to 167, inclusive;  
16:13:00 12 that I have read the said deposition and know the  
16:13:00 13 contents thereof; that the questions contained  
16:13:00 14 therein were propounded to me; that the answers to  
16:13:00 15 said questions were given by me; and that the answers  
16:13:00 16 as contained therein (or as corrected by me therein)  
16:13:00 17 are true and correct.  
16:13:00 18  
16:13:00 19 Corrections Made: Yes \_\_\_\_\_ No \_\_\_\_\_  
16:13:00 20  
16:13:00 21 \_\_\_\_\_  
16:13:00 22 JACK K. LEMLEY  
16:13:00 23  
16:13:00 24 Subscribed and sworn to before me this \_\_\_\_\_  
16:13:00 25 day of \_\_\_\_\_, 2010, at \_\_\_\_\_, Idaho.  
16:13:00 26  
16:13:00 27 \_\_\_\_\_  
16:13:00 28 Notary Public for Idaho  
16:13:00 29 Residing at \_\_\_\_\_, Idaho.  
16:13:00 30 My Commission Expires: \_\_\_\_\_

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42 (Pages 165 to 167)

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho)

Municipal Corporation, )  
) Case No. CV OC 09-7257

Plaintiff, )

v. )

PETRA, INCORPORATED, an Idaho ) Volume II

Corporation, )

Defendant. )

CONTINUED DEPOSITION OF JACK K. LEMLEY

July 22, 2010

Boise, Idaho

Janet French, CSR #946, RPR

INDEX

EXAMINATION

JACK K. LEMLEY PAGE

By: Mr. Trout

EXHIBITS

NO.

612. Mr. Lemley's handwritten notes 283  
(16 pages)

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DEPOSITION OF JACK K. LEMLEY

BE IT REMEMBERED that the deposition of  
JACK K. LEMLEY was taken by the Plaintiff at the  
offices of Trout Jones Gledhill Fuhrman, P.A., located  
at 225 North 9th Street, Suite 820, Boise, Idaho,  
before Associated Reporting, Inc., by Janet French, a  
Court Reporter and Notary Public in and for the County  
of ada, State of Idaho, on Thursday, the 22nd day of  
July, 2010, commencing at the hour of 9:00 a.m. in the  
above-entitled matter.

APPEARANCES:

For the Plaintiff: TROUT JONES GLEDHILL FUHRMAN, P.A.

By: Kim J. Trout, Esq.  
225 North 9th Street, Suite 820  
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For the Defendant: COSHO HUMPHREY, LLP

By: Thomas G. Walker, Esq.  
800 Park Blvd., Suite 790  
Post Office Box 9518  
Boise, Idaho 83707-9518  
Telephone: (208) 344-7811  
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twalker@cosholaw.com

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09:04:12 1  
09:04:12 2  
09:04:12 3  
09:04:12 4  
09:04:12 5  
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09:04:12 7  
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09:04:38 11  
09:04:43 12  
09:04:48 13  
09:05:12 14  
09:05:19 15  
09:05:23 16  
09:05:26 17  
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09:06:00 21  
09:06:07 22  
09:06:12 23  
09:06:15 24  
09:06:17 25

PROCEEDINGS

JACK LEMLEY,

a witness having been first duly sworn to tell the  
truth, the whole truth, and nothing but the truth,  
testified as follows:

EXAMINATION

BY MR. TROUT:

Q. Good morning, sir. This is a  
continuation of your deposition pursuant to notice and  
pursuant to the Idaho Rules of Civil Procedure. I'm  
going to have the court reporter hand you Exhibit  
No. 91.

Now, Mr. Lemley, before we start discussing  
your report, let me ask you a few preliminary  
questions, if I can?

A. Yes, sir.

Q. Prior to starting today, Mr. Walker  
indicated in a discussion with me off the record that  
the notebooks which you had brought with you last  
time, which we are getting printed now so we'll have  
access for your testimony, have been disassembled.

You were present when Mr. Walker made that  
statement; correct?

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1 (Pa



<p>09:06:17 1 A. Yes.</p> <p>09:06:21 2 Q. Can you please tell me, sir, why those</p> <p>09:06:26 3 notebooks have been disassembled?</p> <p>09:06:29 4 A. They were disassembled, from my</p> <p>09:06:38 5 understanding, to convenience the people in my office.</p> <p>09:06:41 6 Q. And convenience them for what purpose?</p> <p>09:06:44 7 A. For the purpose of continuing to study them</p> <p>09:06:48 8 and compare them with new information that we have</p> <p>09:06:52 9 received the past week-and-a-half.</p> <p>09:06:56 10 Q. And what new information have you received</p> <p>09:07:01 11 in the past week-and-a-half?</p> <p>09:07:06 12 A. We've received other expert reports and</p> <p>09:07:21 13 other data that you and your client have released to</p> <p>09:07:21 14 us.</p> <p>09:07:26 15 Q. All right. And what, if any, task has been</p> <p>09:07:35 16 assigned to Lemley International with the new data</p> <p>09:07:36 17 that you received?</p> <p>09:07:40 18 A. Nothing that I know of. It's a continuation</p> <p>09:07:51 19 of reviewing our report to see that it's accurate and</p> <p>09:07:57 20 up to date. And I think absent a written instruction</p> <p>09:08:04 21 from Mr. Walker, we've taken that on our own</p> <p>09:08:04 22 responsibility.</p> <p>09:08:13 23 Q. All right. Well, what, if anything, have</p> <p>09:08:19 24 you done in the interim since your first deposition</p> <p>09:08:28 25 session to prepare yourself for today?</p> <p style="text-align: right;">Page 172</p>	<p>09:11:07 1 International prepared Exhibit No. 91, what was the</p> <p>09:11:11 2 purpose of your report?</p> <p>09:11:20 3 A. The purpose of our report was to try to</p> <p>09:11:28 4 clarify the position of Meridian v. Petra concerning</p> <p>09:11:37 5 the contract that existed between them as opposed to</p> <p>09:11:45 6 the work that was actually done at the site.</p> <p>09:11:48 7 Q. I'm not sure I understand your answer.</p> <p>09:11:53 8 When you say "clarify," what do you mean?</p> <p>09:12:05 9 A. I mean that I believe there is a lack of</p> <p>09:12:13 10 understanding on the part of the parties concerning</p> <p>09:12:18 11 their relationship and the relationship of the other</p> <p>09:12:22 12 entities that were involved in the design and</p> <p>09:12:26 13 construction of the Meridian -- new Meridian City</p> <p>09:12:26 14 Hall.</p> <p>09:12:31 15 Q. Okay. What lack of understanding do you</p> <p>09:12:32 16 believe exists?</p> <p>09:12:45 17 A. Well, I believe that Meridian has an</p> <p>09:12:53 18 overblown expectation that could not be met by the way</p> <p>09:13:04 19 the City of Meridian organized their efforts to have</p> <p>09:13:15 20 designed and built a new city hall having the</p> <p>09:13:21 21 architect separated from the construction manager that</p> <p>09:13:33 22 was hired, and not having that a fully integrated</p> <p>09:13:36 23 effort.</p> <p>09:13:45 24 Secondly, that the City did not have a</p> <p>09:13:52 25 designated contracting officer that was responsible</p> <p style="text-align: right;">Page 174</p>
<p>09:08:32 1 A. I reviewed our report. I read my previous</p> <p>09:08:43 2 deposition, and I just gave the errata sheet to</p> <p>09:08:49 3 Mr. Walker within the last ten minutes. It is not an</p> <p>09:08:50 4 extensive number of changes.</p> <p>09:08:55 5 Q. Okay. What are the changes?</p> <p>09:09:01 6 A. I believe I did not speak clearly on page</p> <p>09:09:13 7 49. I stated that I had advised my client, the State</p> <p>09:09:17 8 of Massachusetts, in reorganizing their oversight of</p> <p>09:09:27 9 the big dig not to allow their program manager to</p> <p>09:09:37 10 co-opt the State of Massachusetts organization. It</p> <p>09:09:41 11 was printed in the deposition as corrupt.</p> <p>09:09:43 12 Q. Okay.</p> <p>09:09:47 13 A. I'm not suggesting that Boston isn't in some</p> <p>09:09:51 14 way corrupt, but that wasn't my advice, and I</p> <p>09:09:54 15 apologize to the reporter for not speaking clearly.</p> <p>09:09:59 16 Q. Okay. Were there any other changes that you</p> <p>09:10:00 17 noted?</p> <p>09:10:03 18 A. No. Nothing in substance.</p> <p>09:10:09 19 Q. All right. In the interim, after reviewing</p> <p>09:10:17 20 your report, which is contained in Exhibit No. 91, did</p> <p>09:10:23 21 you find any inaccuracies?</p> <p>09:10:29 22 A. At this point, I have found nothing that I</p> <p>09:10:48 23 or my staff believes need to be changed in any way,</p> <p>09:10:56 24 and we stand behind it as it was written.</p> <p>09:11:01 25 Q. Okay. Tell me, sir, when you -- when Lemley</p> <p style="text-align: right;">Page 173</p>	<p>09:13:59 1 for continuously working with the architect and the</p> <p>09:14:00 2 construction manager.</p> <p>09:14:08 3 Q. All right. Tell me what you mean when you</p> <p>09:14:13 4 say that Meridian had an overblown expectation that</p> <p>09:14:14 5 could not be met.</p> <p>09:14:16 6 What does that mean?</p> <p>09:14:20 7 A. It meant that their expectation was beyond</p> <p>09:14:25 8 what they could accomplish with the organization that</p> <p>09:14:29 9 they put in place?</p> <p>09:14:33 10 Q. Well, define for me, if you would, please,</p> <p>09:14:37 11 what you mean by the use of the word "expectation."</p> <p>09:14:42 12 A. Well, from the standpoint of the</p> <p>09:14:54 13 relationship today, I believe Meridian has lost -- had</p> <p>09:14:58 14 lost a significant opportunity to settle this at</p> <p>09:15:06 15 several different times since the building was</p> <p>09:15:14 16 completed and occupied by City administration.</p> <p>09:15:31 17 Q. I'm not sure I understand how -- well, what</p> <p>09:15:41 18 is that you have been -- have you been given some</p> <p>09:15:45 19 documents of some kind with respect to settlement?</p> <p>09:15:50 20 A. No, I haven't. I had understood that there</p> <p>09:16:09 21 had been meetings and the meetings hadn't borne fruit,</p> <p>09:16:15 22 which in my mind is a shame, because any time there is</p> <p>09:16:20 23 a contract dispute that -- where the parties are as</p> <p>09:16:32 24 dug in as this one, the settlement is generally much</p> <p>09:16:39 25 more expensive, if for no other reason for fees for</p> <p style="text-align: right;">Page 175</p>

09:16:43 1 people like Lemley International, your firm, and  
 09:16:45 2 Mr. Walker's firm.  
 09:16:50 3 Q. Well, let's back up and take that one item  
 09:16:52 4 at a time.  
 09:16:57 5 First of all, what specifically have you  
 09:17:02 6 been told about settlement efforts?  
 09:17:07 7 A. That there have been offers of settlement  
 09:17:21 8 sometime ago, and then significantly higher values  
 09:17:27 9 requested more recently for payment to Petra to settle  
 09:17:30 10 differences.  
 09:17:34 11 Q. Anything else?  
 09:17:37 12 A. Not that I have specific recall of.  
 09:17:42 13 Q. All right. Do you have any general recall  
 09:17:45 14 of anything else?  
 09:17:48 15 A. I've given you my general recall, sir.  
 09:17:51 16 Q. And who spoke to you about offers of  
 09:17:53 17 settlement?  
 09:18:01 18 A. I had some conversation with Mr. Walker, and  
 09:18:15 19 I've had conversations with Jerry --  
 09:18:16 20 THE WITNESS: Is it Lewis?  
 09:18:17 21 MR. WALKER: Frank.  
 09:18:22 22 THE WITNESS: Oh, Frank. Yeah, Frank Lewis.  
 09:18:23 23 MR. WALKER: No. Jerry Frank.  
 09:18:27 24 THE WITNESS: Jerry Frank. Pardon me. I'm very  
 09:18:27 25 sorry.

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09:18:29 1 Q. (BY MR. TROUT) Who's Frank Lewis?  
 09:18:34 2 A. He's the managing executive of Petra.  
 09:18:38 3 MR. WALKER: I think you've misspoke. You meant  
 09:18:43 4 to correct him -- it's Jerry Frank, not Frank Lewis --  
 09:18:47 5 MR. TROUT: Well, I think the witness can speak  
 09:18:51 6 for himself, and I ask that you allow him to do so.  
 09:18:54 7 Q. (BY MR. TROUT) Tell me, Mr. Lemley, what  
 09:18:57 8 specifically did Mr. Walker say to you about  
 09:18:58 9 settlement?  
 09:19:00 10 A. Said there had been some conversations  
 09:19:09 11 within Petra, and they were trying to encourage  
 09:19:14 12 Meridian to join in an effort to settle the  
 09:19:17 13 differences between the two parties.  
 09:19:18 14 Q. Anything else?  
 09:19:19 15 A. Not that I recall.  
 09:19:24 16 Q. Okay. Tell me about your conversation with  
 09:19:27 17 Jerry Frank.  
 09:19:32 18 A. It was essentially the same -- the same  
 09:19:39 19 information, however, I had had a meeting on another  
 09:19:44 20 matter with him at the same time, and that has nothing  
 09:19:45 21 to do with this case.  
 09:19:50 22 Q. Well, tell me specifically what Mr. Frank  
 09:19:52 23 said to you about this case.  
 09:20:01 24 A. That they -- they, Petra, desired to find a  
 09:20:09 25 solution to the case, that their business had been

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09:20:14 1 damaged in a broader sense beyond this particular  
 09:20:22 2 project, and they were anxious to get the matter  
 09:20:34 3 settled so that the damage to their reputation would  
 09:20:40 4 be corrected and hopefully turned around in the  
 09:20:41 5 industry.  
 09:20:46 6 Q. And so what did Mr. Frank tell you was the  
 09:20:51 7 damage to his business in the broader sense, as you  
 09:20:54 8 used that term?  
 09:21:04 9 A. Well, it's obvious that most businessmen  
 09:21:09 10 need new clients to continue to prosper just as your  
 09:21:12 11 law firm needs new clients to continue to prosper.  
 09:21:20 12 Q. And so what, if anything, did Mr. Frank tell  
 09:21:24 13 you about Petra's obtaining new clients?  
 09:21:28 14 A. They were having difficulty doing that now  
 09:21:35 15 and that their -- the calls that they had normally  
 09:21:39 16 received at this time of year were significantly below  
 09:21:48 17 those that had historically come in.  
 09:21:52 18 Q. And what, if anything, did Mr. Frank  
 09:22:01 19 attribute to the volume of calls that were being made  
 09:22:02 20 to Petra?  
 09:22:06 21 A. That there had been allegations by one of  
 09:22:12 22 their clients that they had not lived up to their  
 09:22:16 23 contract with the City of Meridian.  
 09:22:21 24 Q. Okay. Anything else?  
 09:22:22 25 A. Not that I recall.

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09:22:31 1 Q. All right. Let's turn back -- well, first  
 09:22:34 2 of all, did you have any conversations regarding  
 09:22:37 3 settlement with anyone else?  
 09:22:41 4 A. No one else outside of our firm.  
 09:22:46 5 Q. All right. And who did you discuss this  
 09:22:50 6 with inside of Lemley International?  
 09:22:53 7 A. I discussed it with the staff there.  
 09:22:56 8 Q. Which members of the staff?  
 09:22:57 9 A. Primarily Mr. Bauer.  
 09:23:03 10 Q. And tell me the substance of the discussion  
 09:23:05 11 with Mr. Bauer.  
 09:23:07 12 A. They were in essence the same discussions  
 09:23:12 13 that I just described to you that I had with  
 09:23:13 14 Mr. Frank.  
 09:23:19 15 Q. Okay. Okay. Do you know someone by the  
 09:23:21 16 name of Frank Lee?  
 09:23:21 17 A. I do.  
 09:23:25 18 Q. And how do you know Mr. Lee?  
 09:23:34 19 A. I worked with him on the water center that  
 09:23:40 20 was constructed at Broadway and Main as we were the  
 09:23:45 21 agency construction manager on that project.  
 09:23:56 22 Q. Okay. And did you in your work with Mr. Lee  
 09:24:01 23 gain an understanding of his skills as a lawyer?  
 09:24:02 24 A. Yes.  
 09:24:05 25 Q. Do you believe him to be a skilled attorney?

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3 (Pages 176 to 179)



09:24:06	1	A. I do.	09:27:31	1	A. No.
09:24:17	2	Q. Do you accept his opinions on the law as	09:27:34	2	Q. Did anyone else ask you to call Mr. Lee?
09:24:19	3	being valid?	09:27:35	3	A. No.
09:24:20	4	MR. WALKER: Objection. Lack of foundation.	09:27:49	4	Q. Okay. So, returning to Exhibit No. 91.
09:24:26	5	THE WITNESS: On things he knows about, I accept	09:27:49	5	A. Yes, sir.
09:24:32	6	his opinions. I think he's pretty young, and he has	09:27:53	6	Q. What is it that Lemley International was
09:24:38	7	senior partners in his firm that generally direct his	09:28:01	7	hired to do with respect to Exhibit No. 91?
09:24:39	8	activities.	09:28:09	8	A. To analyze the agency CM contract that Petra
09:24:39	9	MR. TROUT: Okay.	09:28:21	9	signed with Meridian, and the work that was done by
09:24:46	10	Q. (BY MR. TROUT) If Mr. Lee provided you with	09:28:25	10	them under the terms of that contract to determine
09:24:53	11	a specific opinion about a subject that he was	09:28:36	11	whether or not they had performed in an adequate
09:24:59	12	intimately familiar with in the law, would you accept	09:28:37	12	fashion consistent with the contract.
09:25:01	13	it as valid?	09:28:42	13	Q. All right. So tell me the process that was
09:25:03	14	MR. WALKER: Objection. Lack of foundation.	09:28:52	14	undertaken to analyze the agency's CM contract.
09:25:05	15	THE WITNESS: I would certainly read it and give	09:29:03	15	A. Well, we do have a reasonable level of
09:25:06	16	it due consideration.	09:29:09	16	expertise in agency type construction management
09:25:08	17	Q. (BY MR. TROUT) What is due consideration	09:29:14	17	contracts particularly here in the valley as related
09:25:09	18	mean?	09:29:24	18	to the capitol restoration and expansion, so we were
09:25:12	19	A. I would take it seriously and consider it in	09:29:30	19	weighing what their obligations were as they
09:25:17	20	light of our report on this matter between the parties	09:29:37	20	understood them to Meridian to determine whether they
09:25:17	21	here.	09:29:44	21	have -- they had fulfilled their obligations with the
09:25:20	22	Q. Okay. Do you recall having a conversation	09:29:50	22	data that we had and a site visit, granted that was a
09:25:28	23	with Mr. Lee some two-and-a-half, three weeks ago?	09:29:54	23	very cursory site visit well after the City had
09:25:31	24	A. Yes. I thought it was going to be two to	09:30:02	24	occupied the building and begun to use it, but I got a
09:25:35	25	three weeks. It was -- yes, I did have a conversation	09:30:06	25	general picture of the overall appearance of the
Page 180			Page 182		
09:25:35	1	with him.	09:30:12	1	building and the size of it.
09:25:41	2	Q. Okay. What is it that prompted you to call	09:30:25	2	Q. Now, when you say Petra's obligations as
09:25:42	3	Mr. Lee?	09:30:31	3	they understood them. Is there some understanding of
09:25:48	4	A. Because I knew him, and I knew him as a	09:30:39	4	Petra's obligations that was conveyed to you that is
09:25:56	5	property attorney, not necessarily a construction	09:30:42	5	different than the express language of the
09:26:03	6	management expert, and I had understood that he had	09:30:45	6	construction management agreement?
09:26:08	7	been involved with the City in buying the property	09:30:51	7	A. No. There was not. We used the -- the
09:26:17	8	upon which the City Hall has been constructed, and my	09:30:59	8	actual agreement as the starting point for our review
09:26:22	9	intent was to find out if he had in the purchase price	09:31:11	9	and weighed it against our similar obligations to the
09:26:30	10	of the property taken into account the hazardous waste	09:31:19	10	State of Idaho and then we held meetings with Petra's
09:26:34	11	material that had to be removed at significant expense	09:31:31	11	staff that was on site -- and Jerry Frank was also
09:26:36	12	by the City of Meridian.	09:31:39	12	present -- to get their understanding of what they
09:26:40	13	Q. So did you specifically talk to him about	09:31:48	13	were to do and how they had performed the various
09:26:41	14	hazardous waste?	09:31:49	14	obligations that they had.
09:26:44	15	A. Yes. That was the reason I called him.	09:31:54	15	Q. Okay. So let's take that one item at a
09:26:47	16	Q. Did you talk to him about anything else?	09:31:56	16	time.
09:26:49	17	A. Well, I said the purchase price of the	09:32:03	17	Prior to the preparation of this report, how
09:26:51	18	property and hazardous waste.	09:32:10	18	many meetings did you have with, first of all, Jerry
09:26:54	19	Q. Did you talk to him about any other subject?	09:32:12	19	Frank?
09:27:04	20	A. I said, I believe that I felt the parties in	09:32:13	20	A. I think two.
09:27:18	21	this lawsuit were not doing justice to the contract	09:32:18	21	Q. Okay. When was the first?
09:27:22	22	between the parties and Meridian's potential	09:32:21	22	A. I have no recall of the date.
09:27:25	23	liability.	09:32:25	23	Q. All right. Do you recall where it took
09:27:30	24	Q. Okay. Did Mr. Walker ask you to call	09:32:26	24	place?
09:27:31	25	Mr. Lee?	09:32:27	25	A. In my office.
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09:32:31 1 Q. All right. Was anyone else present?

09:32:39 2 A. Mr. Bauer and subsequently Mr. Walker was

09:32:40 3 present.

09:32:43 4 Q. And you say, subsequently. What does that

09:32:44 5 mean?

09:32:47 6 A. I said there was a couple of meetings.

09:32:54 7 Mr. Walker sat in one of them, and we had a meeting

09:33:01 8 of -- I'll call it the principals without counsel

09:33:01 9 there.

09:33:06 10 Q. All right. Now, with respect to the first

09:33:11 11 meeting, tell me what was said by Mr. Frank and what

09:33:18 12 was said by you and what was said by Mr. Bauer.

09:33:30 13 A. Mr. Frank assured me that Gene Bennett and

09:33:34 14 Mr. Coughlin were experienced construction management

09:33:40 15 people here in the Treasure Valley, and that he had a

09:33:48 16 high degree of confidence in their work and felt that

09:33:56 17 they had, in fact, met their obligations under the

09:34:06 18 contract in the broadest sense.

09:34:11 19 Q. Okay. Did Mr. Frank say anything else?

09:34:14 20 A. Probably, but I don't have any recall of it.

09:34:17 21 Q. Okay. Did you keep any notes of that

09:34:17 22 meeting?

09:34:20 23 A. I didn't. Mr. Bauer may have.

09:34:27 24 Q. Do you recall anything else that was said by

09:34:30 25 Mr. Frank at that meeting?

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09:34:30 1 A. No, I don't.

09:34:33 2 Q. Do you recall anything that was said by

09:34:36 3 Mr. Bauer during that meeting?

09:34:42 4 A. No. We talked about the clauses in the

09:34:48 5 contract, but I have no specific recall of the

09:34:54 6 questions and answers that were proffered and

09:35:06 7 responded to. As far as specifics relative to the

09:35:10 8 meeting, I think Mr. Bauer was the only person that

09:35:14 9 had any notes of that meeting on Lemley

09:35:16 10 International's side.

09:35:19 11 Q. Okay. Do you recall which clauses of the

09:35:28 12 contract you discussed?

09:35:31 13 A. Yes. I had a specific interest in

09:35:35 14 whether -- and what involvement they had with

09:35:50 15 Lombard-Conrad, the architect, and they said that they

09:36:01 16 had no official legal relationship with them, other

09:36:10 17 than that mentioned in their contract where they sent

09:36:16 18 bills from the general contractor and themselves to

09:36:19 19 LCA for approval.

09:36:23 20 Q. Well, we'll come back to that.

09:36:30 21 Who said that they had no legal relationship

09:36:34 22 with LCA?

09:36:40 23 A. I'm sorry, sir. I cannot recall. I was

09:36:45 24 giving you, to the best of my recollection, what

09:36:54 25 points were discussed in the meeting, and I told you

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09:37:05 1 earlier, I have no specific recall of the agenda and

09:37:06 2 whatnot of the meeting.

09:37:09 3 Q. Okay. Other than what you have just

09:37:12 4 described to me, was anything else discussed by you

09:37:16 5 and Mr. Bauer and Mr. Frank in the first meeting?

09:37:19 6 A. Not that I recall.

09:37:27 7 Q. Okay. Would that meeting be noted in your

09:37:32 8 time records?

09:37:34 9 A. It very well could be.

09:37:39 10 Q. Okay. When was the second meeting with

09:37:43 11 Mr. Frank?

09:37:47 12 A. It was more recent, probably in the last

09:37:49 13 month-and-a-half or two months.

09:37:52 14 Q. Was it before your report went out?

09:37:52 15 A. No.

09:37:59 16 Q. Okay. So this had been held after your

09:37:59 17 report?

09:37:59 18 A. Yes.

09:38:05 19 Q. Okay. Who was present in that meeting?

09:38:10 20 A. It was the same cast of characters both from

09:38:12 21 Petra and Lemley International.

09:38:16 22 Q. And that would be who?

09:38:21 23 A. Mr. Bauer, and myself, from Lemley

09:38:26 24 International; Mr. Frank, Mr. Bennett, and

09:38:31 25 Mr. Gloughlin -- or Coughlin.

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09:38:38 1 Q. Okay. Were Mr. Bennett and Mr. Coughlin in

09:38:39 2 the first meeting?

09:38:44 3 A. They were in the first meeting that I had,

09:38:51 4 and I had a separate meeting with those two on the

09:39:03 5 site one afternoon. I have no recall as to whether

09:39:06 6 Mr. Frank was there or not that afternoon.

09:39:09 7 Q. Okay. And so let's go back to the first

09:39:10 8 meeting.

09:39:15 9 What, if anything, was said by Mr. Bennett

09:39:18 10 during that first meeting?

09:39:28 11 A. His general line of information was that

09:39:36 12 there had been a constant flow of information between

09:39:44 13 him and his team, and the City people that were

09:39:49 14 involved in the project from time to time, like

09:39:54 15 Mr. Watts and Mr. Baird and others, but there didn't

09:40:01 16 seem to be anyone with full responsibility to manage

09:40:10 17 the program from the City's administration.

09:40:14 18 Q. Okay. When you say, manage the program,

09:40:15 19 what do you mean?

09:40:20 20 A. I mean having somebody that represents a

09:40:29 21 contact between the architect and the CM contractor to

09:40:36 22 see that the design is developed in a way that work

09:40:50 23 can be constructed on an efficient bases and attested

09:40:55 24 to by the City that, yes, that's what they want to

09:40:56 25 have built.

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5 (Pages 184 to 187)

09:40:59 1 Q. Okay. And it's your testimony that there  
 09:41:03 2 was no one to fill that role; is that correct?  
 09:41:06 3 A. No single individual, yes. That's correct.  
 09:41:14 4 Q. All right. Would that, in effect, be for  
 09:41:18 5 lack of a better term, managing the design?  
 09:41:21 6 A. The design certainly had to be managed, and  
 09:41:26 7 the architect was very well capable to manage his  
 09:41:34 8 staff in his office. I'm thinking it's more an  
 09:41:36 9 integration issue between the physical construction  
 09:41:42 10 and the design as it is carried forward.  
 09:41:46 11 Q. Okay. What else does Mr. Bennett say, if  
 09:41:49 12 anything, that you recall?  
 09:41:56 13 A. I don't have specific recollection. I think  
 09:42:12 14 he -- he was concerned that they weren't getting  
 09:42:17 15 direct responses to their budgets as they were  
 09:42:23 16 developed, and the budgets were climbing against the  
 09:42:27 17 12,200,000, and the City seemed to have little  
 09:42:36 18 interest in their value engineering proposals and  
 09:42:44 19 rejected those but continued to add aspects to the  
 09:42:51 20 program such as a LEED requirement for the program  
 09:42:56 21 that had not been part of their original instruction.  
 09:43:02 22 Q. When you say, not getting direct responses,  
 09:43:06 23 what does that mean?  
 09:43:12 24 A. Letters advising Petra exactly what the City  
 09:43:17 25 wanted and what the architect was going to do. I

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09:43:21 1 think -- it's my experience that construction managers  
 09:43:28 2 generally want all changes documented in a letter from  
 09:43:33 3 a designated and appropriate person.  
 09:43:37 4 Q. Okay. That would seem to make perfect  
 09:43:38 5 sense, wouldn't it?  
 09:43:39 6 A. It would.  
 09:43:59 7 Q. Okay. And so what, if anything else, did  
 09:44:02 8 Mr. Bennett say during that meeting?  
 09:44:03 9 A. I can't remember.  
 09:44:10 10 Q. Okay. Is this the same meeting in which you  
 09:44:14 11 said you didn't take any notes; right?  
 09:44:18 12 A. I seldom take any notes personally. If I  
 09:44:25 13 can't write it in a one-line description in a  
 09:44:28 14 daytimer, I don't keep voluminous notes.  
 09:44:30 15 Q. Okay. Do you remember anything that was  
 09:44:33 16 said by Mr. Coughlin during that meeting?  
 09:44:35 17 A. My recollection is that he supported  
 09:44:44 18 Mr. Bennett's statements. There wasn't a disagreement  
 09:44:48 19 between the two that came to light.  
 09:44:57 20 Q. Okay. And the meeting you just described  
 09:45:01 21 occurred prior to writing your report; correct?  
 09:45:01 22 A. Yes.  
 09:45:08 23 Q. All right. Let's move now to the next  
 09:45:11 24 meeting which occurred you say about a month ago?  
 09:45:11 25 A. Yes.

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09:45:16 1 Q. All right. And you said Mr. Bauer and  
 09:45:20 2 yourself were present from Lemley; correct?  
 09:45:20 3 A. Yes.  
 09:45:24 4 Q. Oh, going back to the first meeting. At the  
 09:45:29 5 time of that meeting, who was Mr. Coughlin working  
 09:45:30 6 for?  
 09:45:31 7 A. I don't know.  
 09:45:39 8 Q. Okay. In the second meeting, yourself and  
 09:45:43 9 Mr. Bauer were present. Mr. Frank was present as  
 09:45:43 10 well?  
 09:45:44 11 A. Yes.  
 09:45:46 12 Q. Mr. Bennett and Mr. Coughlin?  
 09:45:47 13 A. Yes.  
 09:45:49 14 Q. Mr. Walker?  
 09:45:53 15 A. Mr. Walker was present part time.  
 09:45:57 16 Q. All right. So what was the purpose of the  
 09:46:02 17 meeting which occurred about a month ago after you  
 09:46:07 18 wrote your report?  
 09:46:14 19 A. It was more to go over the perceptions of  
 09:46:26 20 where the circumstances between the parties stood,  
 09:46:32 21 what they had -- what they believed was the situation,  
 09:46:39 22 which was that this whole process was dragging on and  
 09:46:41 23 not moving forward.  
 09:46:47 24 Q. Okay. So let's kind of break it down.  
 09:46:54 25 What specifically was said by Mr. Frank?

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09:47:00 1 A. All I can do is paraphrase what I think --  
 09:47:07 2 my impression and recollection is that he was becoming  
 09:47:13 3 very impatient to get this settled and wanted to know  
 09:47:18 4 if we had any ideas about how to settle a matter.  
 09:47:28 5 Q. Okay. And did you offer any ideas?  
 09:47:35 6 A. No. I said I would push the legal team to  
 09:47:43 7 the extent that they explored the idea of suing  
 09:47:49 8 individuals in the Meridian City government. The  
 09:47:55 9 legal advice was that couldn't be done because they  
 09:47:58 10 were officials employed by government in the State of  
 09:48:02 11 Idaho. Because if I had -- if I had the opportunity  
 09:48:06 12 and had to make the decision, and I could do it  
 09:48:12 13 legally, I would sue the mayor and sue all of these  
 09:48:19 14 other gentlemen who had given instructions about this  
 09:48:19 15 building.  
 09:48:22 16 Q. Why would you sue them?  
 09:48:26 17 A. In order to force them to start to react and  
 09:48:30 18 pay what they owed me.  
 09:48:36 19 Q. Well, what would be the basis for your claim  
 09:48:40 20 that they had done something wrong?  
 09:48:42 21 A. I would claim that they had not done  
 09:48:50 22 their -- hadn't fulfilled their responsibility as  
 09:48:53 23 mayor, purchasing manager, et cetera, et cetera for  
 09:48:54 24 the City of Meridian.  
 09:48:59 25 Q. And on what factual basis would you make

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6 (Pages 188 to 191)

09:49:00 1 that claim?

09:49:08 2 A. Well, the fact that the building got built.

09:49:12 3 It's a pretty decent looking building. Their

09:49:17 4 government is in their functioning, and they refuse to

09:49:24 5 pay what in the context of this whole situation is a

09:49:30 6 very small sum that they owed Petra to settle the

09:49:33 7 matter, and they could have done that several years

09:49:37 8 ago, and they would have more than saved that money in

09:49:42 9 your fees and my fees and Mr. Walker's fees.

09:49:50 10 Q. Is that the only basis?

09:49:55 11 A. Well, I'm not sure it's the only basis. I'm

09:49:58 12 not drafting a complaint. If I was drafting a

09:50:01 13 complaint and had a couple days to think about it, I

09:50:04 14 probably could dredge up several more issues.

09:50:07 15 Q. Well, what would they be?

09:50:11 16 A. Well, they are not dredged up, so I can't

09:50:14 17 share them with you. But I will tell you I've done

09:50:19 18 this before, and it's brought about a settlement in a

09:50:28 19 rather rapid manner. And that's all we were talking

09:50:36 20 about anyway was generalizations.

09:50:39 21 Q. All right. So you sued people individually

09:50:43 22 to bring about a settlement regardless of whether or

09:50:48 23 not there was any factual or legal basis under the law

09:50:51 24 for bringing the claim; is that correct?

09:50:53 25 MR. WALKER: Objection. Lack of foundation.

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09:50:57 1 THE WITNESS: No. You're misrepresenting what I

09:50:58 2 said.

09:50:58 3 MR. TROUT: Okay.

09:51:04 4 Q. (BY MR. TROUT) So tell me what -- other

09:51:09 5 than the City's refusal to pay, tell me what violation

09:51:16 6 of duty you think the officials of the City of

09:51:20 7 Meridian have breached that would give rise to a

09:51:24 8 claim, as you see it.

09:51:32 9 A. I believe that they are not attending to the

09:51:36 10 building as promptly as they should have. There has

09:51:45 11 been an offer of -- by the contractors involved to

09:51:52 12 redo the water feature in the plaza in front of the

09:52:01 13 building. They've been put off from doing that. As I

09:52:08 14 understand it, there is 5,000 gallons of water a day

09:52:16 15 being lost, and they haven't allowed the roofer to

09:52:22 16 repair the alleged 75 leaks.

09:52:28 17 Q. Okay. Anything else?

09:52:30 18 A. Not that I can think of now, no.

09:52:35 19 Q. Okay. What is it that the City has been

09:52:41 20 doing that is, quote, not attending to the building?

09:52:43 21 Can you explain that, please.

09:52:46 22 A. I just gave you two examples of it.

09:52:49 23 Q. Okay. Have you spoken directly with any

09:52:51 24 City official regarding this?

09:52:51 25 A. No, I have not.

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09:52:56 1 Q. Okay. Have you spoken directly to any prime

09:53:00 2 contractor related to the plaza or the water features?

09:53:01 3 A. No, I have not.

09:53:04 4 Q. Okay. Have you spoken directly to Western

09:53:05 5 Roofing?

09:53:06 6 A. No, I have not.

09:53:17 7 Q. Okay. Is it important to you to verify in

09:53:20 8 any way information that you've been provided before

09:53:21 9 you form an opinion?

09:53:25 10 A. Yes, it is. And before the court, I expect

09:53:30 11 to interview all the people that that -- and

09:53:33 12 contractors that are involved in this matter.

09:53:36 13 Q. Who did you interview before you wrote your

09:53:39 14 report and submitted to the court in this case?

09:53:41 15 A. It was primarily done off of paper.

09:53:48 16 Q. Okay. So I should be able to hand you the

09:53:53 17 documents that you brought when we first deposed you

09:53:59 18 in order to have you verify the contents of your

09:54:01 19 report; is that correct?

09:54:01 20 A. Should, yes.

09:54:05 21 MR. TROUT: Okay. Well, let's take a five-minute

09:54:07 22 break, and then we'll start that process.

10:06:26 23 (Recess taken from 9:54 a.m. to 10:06 a.m.)

10:06:46 24 MR. TROUT: Back on the record.

10:06:48 25 Q. (BY MR. TROUT) Mr. Lemley, before we took

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10:06:52 1 the break, we were still discussing the meeting -- the

10:06:57 2 second meeting that you had with Mr. Bennett,

10:07:03 3 Mr. Frank, and Mr. Coughlin. Other than what you have

10:07:06 4 presently testified to, do you recall anything else

10:07:10 5 that was said by Mr. Bennett during the second

10:07:11 6 meeting?

10:07:11 7 A. No.

10:07:15 8 Q. Do you recall anything that was said by

10:07:18 9 Mr. Coughlin during the second meeting?

10:07:19 10 A. No.

10:07:21 11 Q. Do you recall anything that was said by

10:07:25 12 Mr. Frank during the second meeting?

10:07:27 13 A. Nothing other than what I've previously

10:07:28 14 stated.

10:07:36 15 Q. Okay. What was said by Mr. Bauer during

10:07:37 16 that meeting?

10:07:42 17 A. As I recall, he asked a series of questions,

10:07:49 18 and the Petra team responded, but I don't recall the

10:07:55 19 questions, and I don't recall the responses.

10:08:02 20 Q. Okay. What was the purpose, if any, for

10:08:08 21 Mr. Bauer asking questions of the Petra team at the

10:08:10 22 second meeting?

10:08:19 23 A. To clarify certain aspects of the Meridian

10:08:20 24 City Hall program.

10:08:23 25 Q. When you use the term, program, what do you

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10:08:24 1 mean?

10:08:37 2 A. The process of hiring an architect,

10:08:47 3 construction manager, demolishing buildings on the

10:08:49 4 site and beginning construction.

10:08:59 5 Q. What was said about the process of hiring

10:09:01 6 the architect?

10:09:06 7 A. Not much that I recall, and I don't know

10:09:15 8 that there was any clear statements about it. I did

10:09:23 9 get out of that meeting -- I became aware that

10:09:30 10 Meridian had retained another architect previous to

10:09:39 11 LCA and ZGA.

10:09:43 12 Q. And who said that?

10:09:44 13 A. I don't recall.

10:09:48 14 Q. Okay. Of what significance, if any, is that

10:09:52 15 commentary?

10:10:03 16 A. It could be significant only in ways each of

10:10:12 17 the individuals in that room might have interpreted

10:10:13 18 it.

10:10:23 19 Q. Well, how did you interpret it?

10:10:29 20 A. I interpreted it that the City had a more

10:10:36 21 complete design than Petra might have been aware of at

10:10:40 22 the time they were asked to propose.

10:10:45 23 Q. Okay. And did you do anything to

10:10:48 24 investigate whether that was a fact or not?

10:10:49 25 A. No.

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10:10:58 1 Q. Okay. What, if anything, was said about the

10:11:04 2 demolition of the existing buildings?

10:11:04 3 A. Nothing that I recall.

10:11:16 4 Q. Okay. What, if anything, was said by

10:11:18 5 Mr. Walker during that meeting?

10:11:19 6 A. Nothing that I recall.

10:11:30 7 Q. Okay. So if I really wanted to know what

10:11:35 8 happened at that meeting, I'd have to ask Mr. Bauer;

10:11:37 9 correct?

10:11:41 10 A. To the extent that he had notes or

10:11:47 11 recollection of more specifics than I do, yes.

10:12:01 12 Q. Okay. Okay. You hold yourself out as an

10:12:03 13 independent expert; is that correct?

10:12:03 14 A. That's correct.

10:12:10 15 Q. Okay. As an independent expert, how is it

10:12:16 16 that you go about assessing the credibility of someone

10:12:20 17 involved in a project like the Meridian City Hall?

10:12:26 18 A. I review the background of the individuals

10:12:34 19 and what they are being considered to do in any future

10:12:36 20 work.

10:12:39 21 Q. Well, if you were going to examine the

10:12:44 22 credibility of someone with respect to the Meridian

10:12:49 23 City Hall, would you do anything to verify by written

10:12:58 24 record the accuracy of what was being represented to

10:12:58 25 you?

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10:13:01 1 A. Yes. And I would probably call references

10:13:14 2 that would be given by a proposer, both as to their

10:13:22 3 professional competence and their record as -- with

10:13:25 4 regard to looking out for the owner's interest.

10:13:34 5 Q. Okay. And what conclusion would you draw if

10:13:42 6 a representation was made to you about what some

10:13:47 7 document said and then you reviewed it and the

10:13:51 8 representation was directly contrary to what the

10:13:53 9 document said?

10:13:56 10 A. I would explore it further.

10:13:59 11 Q. Okay. What does that mean?

10:14:03 12 A. I suppose it could mean a variety of things

10:14:21 13 depending on the circumstances of your hypothetical --

10:14:32 14 Q. Okay.

10:14:35 15 A. -- circumstance.

10:14:39 16 Q. Would I be correct that for each of the

10:14:48 17 statements that you have -- or Lemley International, I

10:14:52 18 should say, has made in the written report, which is

10:14:55 19 Exhibit No. 91, that they were all verified for

10:14:58 20 accuracy before the report was issued?

10:15:02 21 A. To the best of my understanding, that is the

10:15:02 22 case.

10:15:24 23 Q. Okay. Let's turn to page PETRA96939 of

10:15:32 24 Exhibit No. 91.

10:15:35 25 A. 969 --

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10:15:41 1 Q. 39. It's the second page of your letter,

10:15:41 2 sir.

10:15:42 3 A. Oh, all right. Thank you.

10:15:42 4 Q. You're welcome.

10:15:46 5 A. That will help speed things up. I'm a

10:15:47 6 little clumsy.

10:15:50 7 Q. Okay. The second page of the letter says

10:15:54 8 that there were meetings with Petra's senior project

10:15:58 9 and corporate staff, and it identifies, Jerry Frank,

10:16:01 10 Gene Bennett, and Tom Coughlin.

10:16:02 11 A. Yes.

10:16:06 12 Q. Were there any meetings with Mr. Frank,

10:16:08 13 Mr. Bennett, and Mr. Coughlin that you didn't

10:16:09 14 participate in?

10:16:09 15 A. Yes.

10:16:10 16 Q. How many?

10:16:10 17 A. I don't know.

10:16:18 18 Q. Okay. Who orchestrated those meetings?

10:16:18 19 A. Mr. Bauer.

10:16:24 20 Q. Okay. So if I wanted to know what Lemley

10:16:28 21 International learned from those meetings, I'd have to

10:16:30 22 ask Mr. Bauer; is that correct?

10:16:30 23 A. Yes.

10:16:37 24 Q. What did Mr. Bauer convey to you prior to

10:16:44 25 your issuance of this report as to the substance of

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10:16:49	1	those meetings? What did he tell you?	10:21:09	1	as of the date of this report, which is June 10th,
10:16:52	2	A. He told me basically what the balance of	10:21:11	2	2010; is that correct?
10:17:03	3	this report says, specifically, that the building had	10:21:11	3	A. That's correct.
10:17:12	4	been put together and that there were -- that there	10:21:30	4	Q. Okay. So turning to page 1 of 12 in the
10:17:18	5	was at that time an issue on payment for a Change	10:21:36	5	fifth full paragraph, you quote from the construction
10:17:28	6	Order 2 and some general overhead between Meridian and	10:21:39	6	management agreement; is that correct?
10:17:32	7	Petra.	10:21:39	7	A. Yes.
10:17:43	8	Q. Okay. Did he tell you any other substantive	10:21:51	8	Q. Okay. This says, "To do all things or, when
10:17:50	9	facts that he gleaned from meetings from Petra	10:21:54	9	appropriate, require the architect and each contractor
10:17:54	10	personnel that are the basis of this report?	10:22:00	10	to do all things necessary, appropriate, or convenient
10:17:55	11	A. Not that I recall.	10:22:04	11	to achieve the end result desired by the owner,
10:18:02	12	Q. Okay. So if I understand correctly then, we	10:22:08	12	including, but not limited to those tasks set forth in
10:18:05	13	identified three notebooks which you brought with you	10:22:10	13	this Article 4."
10:18:07	14	to your first deposition?	10:22:11	14	Do you see that, sir?
10:18:07	15	A. Yes, sir.	10:22:14	15	A. I do see that, and it was read correctly.
10:18:13	16	Q. And those notebooks are the documentation	10:22:20	16	Q. Thank you. Would you agree with me, sir,
10:18:18	17	which will substantiate what you have prepared in the	10:22:29	17	that Petra on behalf of the City as its agent had the
10:18:21	18	Lemley International report; is that correct?	10:22:35	18	authority pursuant to this quoted paragraph to require
10:18:22	19	A. Presumably.	10:22:41	19	the architect to perform all tasks appropriate and
10:18:26	20	Q. Well, why wouldn't that be correct?	10:22:43	20	necessary for this project?
10:18:29	21	A. I have no idea why it wouldn't be correct.	10:22:50	21	A. Petra had the authority that this paragraph
10:19:04	22	Q. Okay. So let's turn to page 1 of 12.	10:22:59	22	grants it, but they had no ability to monitor the
10:19:06	23	A. Of the actual report?	10:23:07	23	costs of the architect and the instructions that the
10:19:08	24	Q. Yes.	10:23:12	24	architect may be getting from the City directly.
10:19:09	25	A. Okay. I'm there.	10:23:21	25	Q. Well, let's examine that. Tell me what
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10:19:13	1	Q. And for the record, we are at PETRA, page	10:23:27	1	document you're referring to for the support of the
10:19:17	2	No. 96944; is that correct?	10:23:31	2	statement you just made to me.
10:19:21	3	A. I have 40. I have got the one -- what page	10:23:39	3	A. Well, I think the Petra contract with the
10:19:22	4	did you say?	10:23:41	4	City.
10:19:31	5	Q. It is page 1 of 12. It should have an	10:23:44	5	Q. Okay. Any other document?
10:19:35	6	exhibit stamp on it, 504, and it's Bates numbered	10:23:47	6	A. There may be, but I don't have it in mind
10:19:43	7	PETRA96944. Okay?	10:23:48	7	right now.
10:19:52	8	A. I'm not sure I still have located it, but --	10:23:53	8	MR. TROUT: Okay. So let's go off the record for
10:20:02	9	okay. I have Petra 96944, 1 of 12. Yes, sir.	10:24:42	9	just a moment. I'm going to grab another notebook for
10:20:06	10	Q. All right, sir. And at the top of this page	10:24:43	10	you to look at. All right, sir?
10:20:12	11	it says, City of Meridian versus Petra, Inc., the	10:24:45	11	THE WITNESS: Okay.
10:20:14	12	opinion of Jack Lemley.	10:24:46	12	(Off the record.)
10:20:15	13	A. Yes.	10:24:48	13	Q. (BY MR. TROUT) Now, before we examine
10:20:17	14	Q. Is that correct, is this your opinion?	10:24:51	14	Exhibit No. 2, which is the construction management
10:20:20	15	A. Based on everything that I knew at that	10:24:55	15	agreement, I want to ask you one more question about
10:20:20	16	time, yes.	10:24:59	16	the first page of your opinion, which is Exhibit
10:20:26	17	Q. All right. Well, is your opinion as	10:25:04	17	No. 91, sir. If you would turn back to that?
10:20:37	18	expressed on these 12 pages been changed in any way	10:25:06	18	A. Yes. I have it right here.
10:20:39	19	since that time?	10:25:10	19	Q. Okay. You say that under the contract,
10:20:41	20	A. There has been a significant amount of new	10:25:14	20	inspection and testing services were not included in
10:20:47	21	material that we have just had access to and today I	10:25:15	21	Petra's scope.
10:20:52	22	have not changed my opinion, but it may be changed as	10:25:19	22	Do you see that, sir?
10:20:54	23	I review all that new material.	10:25:20	23	A. Yes, I do see it.
10:21:00	24	Q. Okay. Well, let's start with what your	10:25:24	24	Q. Okay. When you use the word "inspection" in
10:21:04	25	opinion was -- and I'm assuming this is your opinion	10:25:30	25	that context, what do you mean? Can you define that
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10:25:32	1	term for me, please?	10:29:41	1	that would require their testing and inspection in
10:25:39	2	A. Inspection in that context means to me very	10:29:46	2	that this is their own building.
10:25:46	3	careful analysis of -- let's take welding as an	10:29:51	3	Q. Well, let me ask you this: Did you verify
10:25:52	4	example of non destructive testing relative to the	10:29:56	4	what inspection and testing was required or mandated
10:25:55	5	adequacy of the wells that are specified by the	10:30:01	5	by law?
10:26:01	6	architect and the structural engineer.	10:30:10	6	A. I did not go to Mr. Walker and ask him that.
10:26:07	7	Q. Okay. Is there a difference between an	10:30:17	7	I only used the experience that we had gained at the
10:26:15	8	inspection of a weld and a construction observation by	10:30:18	8	capitol building.
10:26:18	9	a construction manager?	10:30:25	9	Q. Okay. Well, the capitol building is in
10:26:22	10	A. Yes. There is a difference between	10:30:27	10	Boise, Idaho, isn't it?
10:26:24	11	observations and true inspection.	10:30:28	11	A. It is, yes.
10:26:33	12	Q. Okay. So in the context of this paragraph,	10:30:31	12	Q. And my specific question for you is the
10:26:39	13	in your opinion, on page 1 of 12 of Exhibit No. 91,	10:30:37	13	following: Did you verify in any fashion what
10:26:42	14	you're speaking about a scientific inspection; is that	10:30:41	14	inspection and testing was required -- or mandated by
10:26:44	15	correct?	10:30:46	15	law for the City of Meridian, Idaho, at the time you
10:27:06	16	A. Yes. That's the way I would read it, but I	10:30:47	16	wrote this report?
10:27:11	17	know that the City retained the inspection	10:30:49	17	A. No. Other than state required inspections.
10:27:19	18	responsibility and in some instances hired others to	10:30:52	18	Q. Okay. What are the State required
10:27:20	19	do it for them.	10:30:54	19	inspections?
10:27:23	20	Q. Okay. Well, let's just examine that with a	10:31:00	20	A. Electrical and, I believe, plumbing.
10:27:26	21	little more clarity. When you say "inspection	10:31:04	21	Q. All right. And tell me where would I find
10:27:37	22	responsibility," you're talking about, for example, a	10:31:31	22	in Exhibits 86, 87 -- and I believe we have 88, which
10:27:40	23	materials inspection like steel; correct?	10:31:35	23	I'm placing in front of you. These are the three
10:27:46	24	A. Yes. Now steel inspection may start at the	10:31:38	24	notebooks that you brought with you as the background
10:27:54	25	mill where the steel is produced, and I have often	10:31:41	25	for your report, if I recall?
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10:28:02	1	times sent inspectors into the vendor's factory to	10:31:41	1	A. Yes, sir.
10:28:06	2	monitor the work in the factory. At other times, I've	10:31:44	2	Q. Okay. Where would I find in Exhibit Nos.
10:28:11	3	monitored work as it has been hauled on site and	10:31:49	3	86, 87, or 88, your verification of the inspections
10:28:19	4	directed, but it depends on where you start that in	10:31:50	4	required?
10:28:20	5	the supply chain.	10:31:51	5	A. I have no idea.
10:28:24	6	Q. All right. So when you say, under the	10:31:55	6	Q. Well, can you locate them for me?
10:28:28	7	contract inspection and testing services, you're	10:31:58	7	A. If I counseled with Mr. Bauer, I probably
10:28:33	8	referring to materials testing and inspections such as	10:32:08	8	could shorten the process of locating them, but I'm
10:28:38	9	the steel that was brought to this site; is that	10:32:13	9	not sure I could locate them in the next hour,
10:28:39	10	correct?	10:32:14	10	hour-and-a-half.
10:28:39	11	A. That's correct.	10:32:17	11	Q. Well, this is your report?
10:28:44	12	Q. All right. Now, you specifically quote a	10:32:21	12	A. I'm telling you what I believe about my
10:28:48	13	section of the construction management agreement that	10:32:27	13	being able to find backup material to the specific
10:28:52	14	says, "Owner shall provide all required testing or	10:32:29	14	language of my report.
10:28:58	15	inspection of the work as may be mandated by law."	10:32:31	15	Q. That you can't do it?
10:28:58	16	Okay.	10:32:35	16	A. I didn't say I can't. I said it would take
10:28:59	17	Do you see that?	10:32:39	17	an hour, hour-and-a-half to do it.
10:29:01	18	A. You read that correctly.	10:32:43	18	Q. Well, will you explain for us on the record
10:29:06	19	Q. Very good. Tell me what testing or	10:32:47	19	why it will take you that long, as I thought you were
10:29:16	20	inspection of the work was required by law?	10:32:50	20	fully versed in this matter before you wrote your
10:29:20	21	A. Well, certainly plumbing work and electrical	10:32:54	21	opinion; isn't that the case?
10:29:22	22	work that had to be performed in the building.	10:32:59	22	A. That's been over a month ago, and I do have
10:29:25	23	Q. Okay. What else?	10:33:05	23	a number of other matters that I have to work on, so
10:29:32	24	A. Well, those are the things that immediately	10:33:13	24	my memory doesn't necessarily stay solely on the
10:29:36	25	come to my mind. The City would have other standards	10:33:14	25	Meridian City Hall.
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10:33:19	1	Q. Okay. Is it your testimony that utilizing	10:38:20	1	end result desired by the owner, including" -- the
10:33:27	2	Exhibit Nos. 86, 87, and 88 that you, in fact, did	10:38:25	2	word necessary is in there, but it's misplaced from
10:33:36	3	prior to the issuance of your report verify the	10:38:26	3	the way you were reading it.
10:33:42	4	inspections mandated by law, as you have stated in	10:38:29	4	Q. So you don't think that applies to Petra; is
10:33:45	5	your report?	10:38:30	5	that right?
10:33:48	6	A. Yes. I verified that through Mr. Bauer	10:38:32	6	A. No. I didn't say that.
10:33:56	7	who -- who reviewed all of the supporting	10:38:37	7	Q. Does it apply to Petra?
10:34:03	8	documentation and gave me assurances of it, and some	10:38:41	8	A. It applies to Petra to the extent they had a
10:34:08	9	of it I read and some of it I took his assurance for.	10:38:48	9	-- the obligation contained in their contract as
10:34:14	10	Q. So at least for the inspections, you are	10:38:55	10	supplemented by instruction from Meridian relative to
10:34:17	11	relying on Mr. Bauer; is that right?	10:38:58	11	who was going to have inspection responsibility and
10:34:21	12	A. For a definition of the legally required	10:38:59	12	who would not.
10:34:24	13	inspections in Meridian, yes.	10:39:06	13	Q. Well, let's talk about that then. Okay?
10:34:29	14	Q. Okay. And it's your understanding that	10:39:15	14	You used the word "supplement." When you
10:34:32	15	Mr. Bauer verified that, and it is contained somewhere	10:39:19	15	use the word "supplement," what does that mean?
10:34:38	16	in Exhibit Nos. 86, 87, and 88; right?	10:39:25	16	A. It would mean an instruction given to a
10:34:40	17	A. To the best of my knowledge.	10:39:31	17	contractor who is in the process of doing work under
10:35:17	18	Q. Okay. So with respect to this portion of	10:39:36	18	his contract for an owner.
10:35:24	19	your opinion on inspection, is it your understanding,	10:39:40	19	Q. Well, let's talk about it in the context of
10:35:32	20	sir, that Petra had a responsibility under the	10:39:45	20	this case. You said, instructions supplemented by the
10:35:39	21	construction management agreement to guard the owner,	10:39:49	21	City of Meridian; is that correct?
10:35:43	22	the City of Meridian, against defects in the	10:39:56	22	A. Yes. The City of the Meridian, to the best
10:35:46	23	workmanship?	10:40:03	23	of my recollection, hired Material Testing Group to do
10:35:49	24	A. How do you define the word "guard"?	10:40:11	24	the testing necessary in addition to the City's own
10:35:55	25	Q. Well, the term is a common term in	10:40:27	25	inspection people.
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10:36:01	1	construction management contracts, is it not, sir?	10:40:29	1	Q. And so what?
10:36:03	2	A. I've seen it in construction management	10:40:31	2	A. I believe that's -- I'm not sure what.
10:36:09	3	contracts, but is normally put in a context, and the	10:40:35	3	Restate the question. I guess I have forgotten the
10:36:13	4	word guard by itself is -- can mean anything from a	10:40:35	4	question.
10:36:18	5	barricade to a physical activity that you have to do.	10:40:48	5	Q. All right. Is it your contention that there
10:36:22	6	Q. Okay. In the context of a construction	10:41:01	6	exists some supplemental instruction to Petra which in
10:36:26	7	management agreement, what does the phrase, guard the	10:41:09	7	any way modified its duties under the construction
10:36:31	8	owner against defects in the work, mean to you?	10:41:10	8	management agreement?
10:36:36	9	A. Well, it means to me that the construction	10:41:14	9	A. I think that's more a legal question than a
10:36:48	10	manager will do what he's contractually obligated to	10:41:19	10	question for a construction expert. I do know that
10:36:59	11	do to protect the owner from badly developed	10:41:23	11	Meridian did a significant amount of inspection on the
10:37:02	12	construction that is contrary to the plans and	10:41:35	12	building as it was being constructed by Material
10:37:04	13	specifications of the architect and engineer.	10:41:35	13	Testing Group.
10:37:12	14	Q. Okay. So if we turn back to your opinion --	10:41:42	14	Q. Well, let's focus this question very
10:37:12	15	A. Yes, sir.	10:41:48	15	specifically. Is it your contention as Petra's expert
10:37:26	16	Q. -- all right? And we go up to the fifth	10:41:56	16	in this case that there was some kind of supplemental
10:37:31	17	paragraph where you have quoted the construction	10:42:01	17	instruction issued by the City which modified Petra's
10:37:37	18	management agreement, based upon your experience and	10:42:04	18	duties under the construction management agreement?
10:37:47	19	expertise, where it says that Petra shall, "do all	10:42:09	19	A. I think the performance of Petra with regard
10:37:53	20	things necessary, appropriate, or convenient" --	10:42:18	20	to inspection, that obligation was met to the intent
10:37:56	21	A. The word necessary isn't in there.	10:42:25	21	of the contract during the process of construction.
10:38:00	22	Q. Excuse me. Read that paragraph to me, sir.	10:42:29	22	Q. Well, sir, I'm going to ask you to answer my
10:38:05	23	A. "Do all things or when appropriate require	10:42:33	23	question specifically, and then we'll come back to
10:38:08	24	architect and each contractor to do all things	10:42:34	24	what you just stated.
10:38:14	25	necessary, appropriate, or convenient to achieve the	10:42:39	25	My question specifically is this: As
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10:42:50 1 Petra's expert, do you contend that there was some  
 10:42:54 2 kind of supplemental instruction issued by the City of  
 10:42:57 3 Meridian that modified Petra's contractual duties  
 10:43:10 4 underneath the CMA in any respect?  
 10:43:11 5 MR. WALKER: Objection. Asked and answered.  
 10:43:14 6 THE WITNESS: It would have been necessary at a  
 10:43:19 7 minimum for their inspection responsibility to have  
 10:43:26 8 been expanded through a change order when they ran  
 10:43:31 9 into hazardous waste.  
 10:43:34 10 Q. (BY MR. TROUT) Exclusive of hazardous waste  
 10:43:38 11 and Change Order No. 1, which we will come back and  
 10:43:42 12 talk about, is it your contention as Petra's expert  
 10:43:49 13 that there was some kind of supplemental instruction  
 10:43:53 14 that modified Petra's duties under the construction  
 10:43:56 15 management agreement in any way?  
 10:43:58 16 MR. WALKER: Objection. Asked and answered.  
 10:44:01 17 THE WITNESS: Not that I'm aware of.  
 10:44:02 18 MR. TROUT: Very good, sir.  
 10:44:09 19 Q. (BY MR. TROUT) Now, I'd like you to turn to  
 10:44:20 20 Exhibit No. 2, please. I believe it is contained in  
 10:44:26 21 this notebook.  
 10:44:26 22 A. Oh. Excuse me.  
 10:44:28 23 MR. TROUT: And for the purposes of the record,  
 10:44:31 24 I'm opening Exhibit No. 2 for the witness.  
 10:44:33 25 Q. (BY MR. TROUT) Do you recognize that, sir?

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10:44:36 1 A. This is the data that we put together in  
 10:44:37 2 support of our report.  
 10:44:41 3 Q. Okay. Do you recognize Exhibit No. 2 to be  
 10:44:44 4 the construction management agreement?  
 10:44:48 5 A. In part, yes.  
 10:44:58 6 Q. Well, I'd like you to carefully examine  
 10:45:04 7 Exhibit No. 2 and tell me what, if anything, in your  
 10:48:19 8 opinion is missing from Exhibit No. 2.  
 10:51:53 9 (Brief pause from 10:45 a.m. to 10:53 a.m.)  
 10:53:36 10 THE WITNESS: And your question again, sir?  
 10:53:40 11 Q. (BY MR. TROUT) My question is Exhibit No.  
 10:53:42 12 2 the construction management agreement that you  
 10:53:45 13 relied upon in the preparation of your report?  
 10:53:45 14 A. Yes.  
 10:53:48 15 Q. Is there anything missing in Exhibit No. 2?  
 10:53:50 16 A. Not that I can identify now.  
 10:54:01 17 Q. All right. Are there any additions to  
 10:54:06 18 Exhibit No. 2 that you relied upon in any way in the  
 10:54:07 19 preparation of your report?  
 10:54:12 20 A. The representations of Mr. Bauer as we  
 10:54:18 21 drafted the report and his further investigation of  
 10:54:23 22 the background data and information --  
 10:54:25 23 Q. Well --  
 10:54:29 24 A. -- that was available to our company at that  
 10:54:29 25 time.

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10:54:41 1 Q. Okay. So tell me what, if anything,  
 10:54:46 2 Mr. Bauer told you about the construction management  
 10:54:49 3 agreement between Petra and the City that is not  
 10:55:01 4 contained within the agreement itself?  
 10:55:07 5 A. I can tell you what I believe Mr. Bauer  
 10:55:12 6 advised me relative to Petra's obligation for  
 10:55:21 7 inspection of the work as the construction moved  
 10:55:29 8 forward, and that is that the City had retained a good  
 10:55:36 9 deal of that responsibility under themselves, and  
 10:55:40 10 where there was a legal requirement for outside  
 10:55:44 11 inspection, that that was done by appropriate --  
 10:55:50 12 proper authorities. And in my review of the payment  
 10:56:01 13 schedule for Petra, there is no allowance in the  
 10:56:06 14 payment of their fees for inspection, and I would have  
 10:56:13 15 expected a very significant percentage of their fee to  
 10:56:21 16 be paid on the basis of inspection requirement.  
 10:56:25 17 Q. Well, let me ask the question in a slightly  
 10:56:32 18 different way. Other than what you've quoted in the  
 10:56:37 19 construction management agreement on page 1 of your  
 10:56:46 20 report, did Mr. Bauer represent to you in any manner  
 10:56:50 21 that the construction management agreement was  
 10:56:58 22 anything other than Exhibit No. 2?  
 10:56:59 23 MR. WALKER: Objection. Asked and answered.  
 10:57:04 24 THE WITNESS: Not in the context of the totality  
 10:57:06 25 of the agreement.

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10:57:09 1 Q. (BY MR. TROUT) In any context, did he  
 10:57:14 2 represent to you that the agreement between Petra and  
 10:57:21 3 the City was anything other than that contained within  
 10:57:23 4 Exhibit no 2?  
 10:57:25 5 MR. WALKER: Objection. Asked and answered.  
 10:57:33 6 THE WITNESS: I did say that he had made  
 10:57:36 7 representations to me, and I -- I believe I've  
 10:57:40 8 answered your question, sir.  
 10:57:42 9 Q. (BY MR. TROUT) Well, we are going to agree  
 10:57:48 10 to disagree, but I'll ask it in this way. We'll start  
 10:57:55 11 with this: What representations, specifically, did  
 10:58:00 12 Mr. Bauer make to you as to what the agreement between  
 10:58:06 13 the City and Petra was, other than the terms and  
 10:58:12 14 conditions contained in Exhibit No. 2?  
 10:58:16 15 A. That inspection was going to be retained by  
 10:58:24 16 the City to be performed by another vendor for various  
 10:58:33 17 aspects of the work. The general contractors had an  
 10:58:40 18 obligation to meet the plans and specifications of  
 10:58:48 19 the -- of their general contracts, and Petra had an  
 10:58:57 20 obligation to see that their performance was in  
 10:59:00 21 accordance with their contract.  
 10:59:06 22 Q. Okay. Anything else that Mr. Bauer  
 10:59:13 23 represented to you with respect to the agreement  
 10:59:21 24 between the City and Petra other than the contents of  
 10:59:26 25 the construction management agreement, Exhibit No. 2?

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12 (Pages 212 to 215)

10:59:27 1 A. Not that I can think of.  
 10:59:37 2 Q. Okay. So let's turn again to Exhibit No. 2,  
 10:59:41 3 if you would, please. It is in the folder right in  
 10:59:44 4 front of you, to your immediate right.  
 10:59:45 5 A. Okay.  
 10:59:47 6 Q. You just had it open, sir.  
 10:59:53 7 A. Yes. All right.  
 10:59:56 8 Q. Okay. Do you have Exhibit No. 2 in front of  
 10:59:57 9 you?  
 10:59:57 10 A. I do.  
 11:00:03 11 Q. Okay. Turning within Exhibit No. 2 to  
 11:00:09 12 section 4.7.9, if you would, please.  
 11:00:12 13 A. 4.7.9?  
 11:00:36 14 Q. Yes, sir.  
 11:00:39 15 A. Are you referring to a bar chart or --  
 11:00:46 16 Q. I'm referring to 4.7.9 of Exhibit No. 2, if  
 11:00:47 17 you would find that, please.  
 11:00:52 18 A. I opened the tab for 4, and it contained --  
 11:00:57 19 I think I'm confused here. Is it -- is this the  
 11:01:01 20 exhibit you want me to look at, or is this the  
 11:01:02 21 exhibit?  
 11:01:06 22 Q. The exhibit book that you have in your hand  
 11:01:11 23 is the one which contains the exhibit I want you to  
 11:01:11 24 look at.  
 11:01:18 25 A. Well, it says, Volume 1, Exhibits 1 to 22.

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11:01:19 1 Q. Yes, sir.  
 11:01:24 2 A. All right. Now, what tab might I find this  
 11:01:24 3 under?  
 11:01:28 4 Q. Why don't you try No. 2.  
 11:01:29 5 A. That's very helpful.  
 11:01:33 6 Q. Well, you're welcome.  
 11:01:44 7 Can you tell me what tab No. 2 is?  
 11:02:01 8 A. It appears to be a contract between general  
 11:02:06 9 contractors and construction management.  
 11:02:26 10 Q. Okay.  
 11:02:34 11 A. The first page is a letter to Ted W. Baird,  
 11:02:44 12 the City attorney, and it's transmitting a  
 11:02:47 13 construction management agreement for the City Hall  
 11:02:47 14 Project.  
 11:02:53 15 Q. Okay. Is there anything else contained in  
 11:02:56 16 tab 2?  
 11:03:03 17 A. Construction management agreement, dated  
 11:03:06 18 August 1, 2006.  
 11:03:11 19 Q. Okay. Have you seen that document before?  
 11:03:12 20 A. Yes.  
 11:03:16 21 Q. Okay. When was the first time you reviewed  
 11:03:19 22 that document?  
 11:03:22 23 A. Before I wrote my report.  
 11:03:29 24 Q. Okay. Did you make any notes in your  
 11:03:31 25 review?

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11:03:40 1 A. I may have. I gave all of the notes that I  
 11:03:47 2 had made on a variety of things to Mr. Bauer to sort  
 11:03:57 3 through to be sure that they were copied and sent to  
 11:04:02 4 Mr. Walker, who I -- it was my understanding would be  
 11:04:03 5 sending them to you.  
 11:04:07 6 Q. Okay. Well, we'll come back to that a  
 11:04:07 7 little bit later.  
 11:04:13 8 I'd like you to turn to section 4.7.9, if  
 11:04:17 9 you would, please.  
 11:04:55 10 A. Yes, sir. I have it.  
 11:05:05 11 Q. Okay. I'd like you to read the section  
 11:05:15 12 silently to yourself, and then signify for me when you  
 11:05:43 13 are done.  
 11:05:47 14 A. I have completed my reading of 4.7.9.  
 11:05:53 15 Q. All right, sir. This section required Petra  
 11:06:02 16 to carefully observe the work no less frequently than  
 11:06:04 17 each standard work day; correct?  
 11:06:04 18 A. Yes.  
 11:06:08 19 Q. All right. And it says, "The purpose of  
 11:06:13 20 such observation shall be to determine the quality and  
 11:06:17 21 quantity of work in comparison with the requirements  
 11:06:22 22 of the construction contract."  
 11:06:24 23 Did I read that correctly?  
 11:06:25 24 A. Yes.  
 11:06:29 25 Q. As Petra's expert in this case, based on the

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11:06:33 1 language of the construction management agreement that  
 11:06:39 2 I just read, what was Petra supposed to do?  
 11:06:44 3 A. They were supposed to have an individual or  
 11:06:50 4 more to observe the work of the contractor's working  
 11:06:56 5 on site to see that the work was being done in  
 11:07:01 6 accordance with the individual contractor's contract.  
 11:07:07 7 Q. Okay. Does that mean that they were to  
 11:07:11 8 ensure that the work performed by the prime  
 11:07:14 9 contractors complied with the plans and  
 11:07:16 10 specifications?  
 11:07:16 11 A. Yes.  
 11:07:23 12 Q. Okay. And if the work of the prime  
 11:07:25 13 contractors did not comply with the plans and  
 11:07:30 14 specifications, what was Petra's obligation under the  
 11:07:32 15 construction management agreement?  
 11:07:37 16 A. To reject the work and have it remedied so  
 11:07:40 17 that it did meet the plans and specifications.  
 11:07:52 18 Q. Okay. Now, the next sentence says, "In  
 11:07:56 19 making such observations, the construction manager  
 11:08:01 20 shall protect the owner from continuing deficient or  
 11:08:01 21 defective work."  
 11:08:03 22 Do you see that, sir?  
 11:08:04 23 A. I do.  
 11:08:06 24 Q. Did I read that correctly?  
 11:08:07 25 A. You did.

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13 (Pages 216 to 219)

11:08:12 1 Q. As Petra's expert, what did that mean Petra  
 11:08:15 2 was supposed to do?  
 11:08:24 3 A. Well, I think it is quite explicit in the  
 11:08:27 4 sentence that you read, that's what they were  
 11:08:29 5 obligated to do.  
 11:08:35 6 Q. Okay. And it goes on to say, "In making  
 11:08:37 7 such observations, the construction manager shall  
 11:08:41 8 protect the owner from continuing deficient or  
 11:08:47 9 defective work and from continuing unexcused delays in  
 11:08:48 10 the schedule."  
 11:08:50 11 Do you see that, sir?  
 11:08:50 12 A. Yes.  
 11:08:53 13 Q. Did I read that correctly?  
 11:08:56 14 MR. WALKER: Objection. You misread the  
 11:08:57 15 statement.  
 11:09:00 16 THE WITNESS: I've lost where you are reading.  
 11:09:01 17 Q. (BY MR. TROUT) Well, it is the same  
 11:09:06 18 sentence. It goes on to say, "In making such  
 11:09:09 19 observations, the construction manager shall protect  
 11:09:16 20 the owner from continuing deficient or defective work,  
 11:09:23 21 from continuing unexcused delays in the schedule, and  
 11:09:25 22 from overpayment to a contractor."  
 11:09:28 23 Did I read that correctly?  
 11:09:28 24 A. Yes.  
 11:09:34 25 Q. All right. Where it says, the construction

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11:09:38 1 manager shall protect from continuing unexcused delays  
 11:09:45 2 in the schedule, as Petra's expert, what does that  
 11:09:47 3 mean?  
 11:09:53 4 A. It means that they should coordinate the  
 11:09:57 5 work of the various general contractors in the manner  
 11:10:08 6 that allows the work to go forward in accordance with  
 11:10:14 7 the schedule to see that the overall structure is  
 11:10:19 8 completed on time as outlined in the master schedule.  
 11:10:22 9 Q. Okay.  
 11:10:30 10 A. And that at a quality that comports with the  
 11:10:34 11 anticipation in the general contractor's contract.  
 11:10:36 12 Q. I.e., in accordance with the plans and  
 11:10:38 13 specifications; correct?  
 11:10:39 14 A. Yes.  
 11:10:46 15 Q. All right. Now, in preparing your report,  
 11:10:54 16 were you aware that each prime contractor had a start  
 11:10:56 17 date in their contract?  
 11:10:57 18 A. Yes.  
 11:11:01 19 Q. And were you aware that each prime  
 11:11:06 20 contractor had a substantial completion date in their  
 11:11:07 21 contract?  
 11:11:07 22 A. Yes.  
 11:11:13 23 Q. And were you aware in preparing your report  
 11:11:20 24 that there was a liquidated damage provision in each  
 11:11:25 25 prime contract that would come into play if the prime

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11:11:27 1 contractor failed to meet the date of substantial  
 11:11:29 2 completion stated in the agreement?  
 11:11:30 3 A. Yes.  
 11:11:31 4 Q. Okay.  
 11:11:39 5 A. Unless he was frustrated from starting his  
 11:11:47 6 work on the date specified by something on the project  
 11:11:54 7 that didn't allow the start up of the following  
 11:11:55 8 contractor's work.  
 11:11:58 9 Q. Okay. Well, we'll come back and talk about  
 11:11:58 10 that.  
 11:12:04 11 You were aware, were you not, sir, that in  
 11:12:16 12 the event that any prime contractor had an issue with  
 11:12:18 13 schedule, it was the prime contractor's responsibility  
 11:12:21 14 under the terms of the prime contract to make an  
 11:12:27 15 appropriate and timely request for adjustments to the  
 11:12:28 16 schedule?  
 11:12:31 17 A. Yes. That would be reasonable.  
 11:12:34 18 Q. And those requests would have to be in  
 11:12:35 19 writing; correct?  
 11:12:35 20 A. Yes.  
 11:12:40 21 Q. And they would have to be timely pursuant to  
 11:12:42 22 the prime contract as well; correct?  
 11:12:43 23 A. Yes.  
 11:12:46 24 Q. And if they weren't timely, they would be  
 11:12:48 25 waived in accordance with the prime contract, isn't

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11:12:49 1 that correct?  
 11:12:51 2 A. They would be reviewed before they were  
 11:12:59 3 waived. It wouldn't be an automatic waiver, I think.  
 11:13:04 4 Q. Well, is there some provision of the A201  
 11:13:09 5 general conditions that you as Petra's expert contend  
 11:13:11 6 supports what you just said?  
 11:13:14 7 A. I don't know whether it does or not.  
 11:13:17 8 Q. Okay. You would agree with me, however,  
 11:13:22 9 that the precise terms of the A201 general conditions  
 11:13:27 10 would control the events surrounding either a request  
 11:13:28 11 or a waiver?  
 11:13:33 12 A. I would, barring exceptional events.  
 11:13:40 13 Q. Okay. Well, as we sit here today, given  
 11:13:45 14 your review in preparation and prior to the issuance  
 11:13:59 15 of your report, are you aware of some exceptional  
 11:14:03 16 event that somehow modified the specific provisions of  
 11:14:09 17 the A201 general provisions applicable to every prime  
 11:14:10 18 contractor?  
 11:14:13 19 A. Not applicable to every prime contractor,  
 11:14:21 20 but I believe the masonry contractor had an  
 11:14:28 21 extraordinary situation that called for some  
 11:14:32 22 negotiation of the time versus a potential claim from  
 11:14:32 23 the contractor.  
 11:14:50 24 Q. Well, we'll come back to that.  
 11:14:52 25 MR. WALKER: How about a break, Kim?

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11:14:54	1	MR. TROUT: Sure. Let's take five minutes.	11:25:11	1	the essence clauses, are you not, sir?
11:14:54	2	(Recess taken from 11:14 a.m. to 11:19 a.m.)	11:25:11	2	A. I am.
11:21:11	3	MR. TROUT: Back on the record.	11:25:16	3	Q. And time of the essence clauses like this
11:21:23	4	Q. (BY MR. TROUT) Sir, you still have section	11:25:21	4	one are to be strictly enforced, isn't that correct?
11:21:31	5	4.9 in front of you -- or 4.7.9.	11:25:24	5	MR. WALKER: Objection. Calls for a legal
11:21:38	6	A. I can get there very quickly. 4.7.9 is in	11:25:24	6	conclusion.
11:21:39	7	front of me, yes, sir.	11:25:28	7	THE WITNESS: They are to be strictly enforced
11:21:45	8	Q. All right. Again, directing your attention	11:25:29	8	fairly.
11:21:51	9	to the next to the last sentence in paragraph 4.7.9,	11:25:29	9	MR. TROUT: All right.
11:21:56	10	it goes onto say that the construction manager shall	11:25:38	10	Q. (BY MR. TROUT) Now, let's go back to --
11:22:02	11	protect the owner from, "overpayment to a contractor."	11:25:42	11	well, when you use the term "fairly," you mean in
11:22:05	12	Do you see that, sir?	11:25:46	12	accordance with the contract document itself, don't
11:22:06	13	A. Yes.	11:25:47	13	you, sir?
11:22:09	14	Q. Did I read that correctly?	11:25:47	14	A. Yes.
11:22:10	15	A. Yes.	11:25:51	15	Q. All right. Let's go back to your opinion,
11:22:18	16	Q. All right. Based on your experience, if a	11:25:52	16	if we can.
11:22:33	17	prime contractor was subject to liquidated damages and	11:26:11	17	Do you have that in front of you?
11:22:38	18	was requesting payment in full, would it be Petra's	11:26:13	18	A. My opinion?
11:22:49	19	responsibility to enforce in processing the pay	11:26:14	19	Q. Yes, sir.
11:22:53	20	application the liquidated provision of the prime	11:26:17	20	A. I do. I'm on page 1 of 12.
11:22:55	21	contract?	11:26:20	21	Q. Very good. I'd like to direct your
11:23:00	22	A. Yes.	11:26:25	22	attention to the last full paragraph on 1 of 12, and
11:23:03	23	Q. And that would be one method of preventing	11:26:30	23	if you would read that to yourself silently and
11:23:09	24	overpayment to a contractor; correct?	11:26:36	24	signify for me when you are done.
11:23:10	25	A. Yes.	11:27:23	25	A. I have completed reading it.
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11:23:19	1	Q. Now, turning your attention to the next page	11:27:30	1	Q. All right. You say in the first sentence
11:23:25	2	of Exhibit No. 2, the construction management	11:27:37	2	that based upon the agreed scope, budget, project
11:23:27	3	agreement.	11:27:42	3	size, schedule, and complexity, Petra agreed to a fee.
11:23:29	4	A. You are talking about page 13?	11:27:44	4	Do you see that, sir?
11:23:30	5	Q. Yes, sir.	11:27:44	5	A. I do.
11:23:32	6	A. Yes.	11:27:54	6	Q. Okay. Can you tell me where in Exhibits 86,
11:23:36	7	Q. Directing your attention to section 5.1,	11:28:11	7	87, or 88 I can find your notes or research relating
11:23:40	8	would you read that silently to yourself.	11:28:17	8	to the negotiation of the contract between the City
11:23:41	9	A. I will.	11:28:20	9	and Petra?
11:24:21	10	Q. And signify when you are done, sir.	11:28:25	10	A. I can't.
11:24:22	11	A. I have read it.	11:28:35	11	Q. Are there notes in your Exhibits 86, 87, and
11:24:30	12	Q. Okay. Directing your attention to the last	11:28:39	12	88 in which you have documented the negotiations
11:24:33	13	full sentence, it says, "The time limits established	11:28:42	13	between the City and Petra?
11:24:40	14	by the project schedule are of the essence and shall	11:28:49	14	A. Not to my knowledge.
11:24:43	15	not be exceeded by the construction manager without	11:28:54	15	Q. Okay. So tell me, if you can, sir, what
11:24:47	16	the owner's prior written consent."	11:29:06	16	work was Petra to have performed for the \$574,000 fee?
11:24:49	17	Did I read that correctly?	11:29:09	17	A. It is spelled out in their scope of work,
11:24:50	18	A. Yes, you did.	11:29:15	18	which is clearly outlined in the contract.
11:24:52	19	MS. WALKER: Objection. It's an incomplete	11:29:22	19	Q. Well, let's break it down. Did you in the
11:24:52	20	section of the provision.	11:29:27	20	course of your investigation determine whether or not
11:24:55	21	MR. TROUT: The objection is dully noted. That	11:29:33	21	Petra had prepared any kind of take off or estimate
11:24:58	22	is the only section I'm going to ask the witness	11:29:38	22	with respect to the \$574,000 fee?
11:24:59	23	about, Counsel.	11:29:42	23	A. I'm not aware that they did any take off.
11:25:03	24	Q. (BY MR. TROUT) Now, Mr. Lemley, as Petra's	11:29:47	24	Take off is usually done by the general contractor in
11:25:07	25	construction expert, you are familiar with time is of	11:29:54	25	his performance or tendering process when he is
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11:29:57	1	putting prices to performance of his work.	11:34:01	1	MR. TROUT: Is very simple.
11:30:01	2	Q. Okay. Well, Petra is a general contractor	11:34:03	2	Q. (BY MR. TROUT) What was the project
11:30:05	3	as well as a construction manager, isn't that correct?	11:34:05	3	described in the construction management agreement?
11:30:09	4	A. Petra is not a construction manager at risk.	11:34:12	4	A. It was to build an 80,000 square foot
11:30:10	5	They are an agent of the owner --	11:34:21	5	building to Class A office building standards.
11:30:14	6	Q. And we'll come back to that. My question --	11:34:24	6	Q. Anything else?
11:30:15	7	A. -- in this context.	11:34:29	7	A. Well, on the schedule that the client wanted
11:30:20	8	Q. Okay. My question though is, you are aware	11:34:30	8	it.
11:30:22	9	in addition to performing construction management	11:34:37	9	Q. Okay. Anything else?
11:30:26	10	services Petra is a general contractor as well; is	11:34:45	10	A. Well, they were to oversee the construction
11:30:27	11	that correct?	11:34:51	11	and the construction contractor's work, and deliver
11:30:28	12	A. I am aware of that, yes.	11:34:55	12	the building 80,000 square feet --
11:30:33	13	Q. All right. Would you expect that Petra as a	11:34:57	13	Q. Okay.
11:30:40	14	general contractor would have the skills to do an	11:34:58	14	A. -- on that basis.
11:30:44	15	estimate or take off of their services under the	11:35:02	15	Q. Let's examine your description very
11:30:46	16	construction management agreement?	11:35:03	16	carefully, can we?
11:30:49	17	MR. WALKER: Objection. Compound.	11:35:03	17	A. Yes, sir.
11:30:52	18	THE WITNESS: I believe they would have the	11:35:08	18	Q. All right. I'd like you to return to
11:31:00	19	skills to estimate the cost of services under a	11:35:10	19	Exhibit No. 2, if you would, please.
11:31:06	20	construction management contract.	11:35:10	20	A. Okay.
11:31:07	21	MR. TROUT: Okay.	11:35:13	21	Q. Do you have that front of you?
11:31:08	22	Q. (BY MR. TROUT) And as a construction	11:35:19	22	A. I have this thick binder and -- yes, I guess
11:31:12	23	manager, wouldn't Petra have the skills to estimate	11:35:24	23	that's Exhibit No. 2. I keep looking for Exhibit 2 on
11:31:18	24	the cost of their services under this construction	11:35:27	24	the front of it, and I don't find it.
11:31:23	25	management agreement?	11:35:31	25	Q. Well, you won't. Go to tab 2 in the binder
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11:31:24	1	A. I believe they would.	11:35:33	1	that you are holding.
11:31:40	2	Q. All right. And based on your investigation	11:35:34	2	A. I'm there, sir.
11:31:46	3	as Petra's expert, it's my understanding that Petra	11:35:41	3	Q. All right. Now, tab 2 in the binder that
11:31:56	4	did not have any estimate of the cost for the services	11:35:45	4	you are holding is the -- contains the construction
11:32:02	5	they were going to provide under the fee portion of	11:35:46	5	management agreement.
11:32:04	6	this construction management agreement; is that	11:35:46	6	A. Yes.
11:32:06	7	correct?	11:35:51	7	Q. All right. And if I understand correctly,
11:32:08	8	A. I have no knowledge of that.	11:35:55	8	that's the contract that you're referring to on page 1
11:32:15	9	Q. Okay. Well, if Mr. Bennett said, we didn't	11:35:58	9	of 12 of your opinion; is that correct?
11:32:21	10	prepare an estimate, you would accept that as face	11:35:59	10	A. That's my opinion, yes.
11:32:23	11	value, would you not?	11:36:04	11	Q. All right. So if you turn to tab 2, the
11:32:23	12	A. I would.	11:36:11	12	construction management agreement, would you show me
11:32:39	13	Q. Okay. So you go on to say that it's the	11:36:15	13	the specific language where you say it's an 80,000
11:32:42	14	opinion of Lemley International that the agreed	11:37:29	14	square foot building.
11:32:45	15	compensation was reasonable for the project described	11:39:04	15	(Brief pause from 11:36 a.m. to 11:39 a.m.)
11:32:48	16	in the contract.	11:39:13	16	THE WITNESS: I don't see it in this document.
11:32:49	17	Do you see that, sir?	11:39:21	17	It may have been in the solicitation. I know it has
11:32:50	18	A. Yes.	11:39:25	18	been talked about from the time I have been engaged in
11:32:55	19	Q. Okay. Tell me, if you would, please, what	11:39:30	19	the project, but I'm not seeing it in this scope of
11:33:05	20	the project described in the contract was.	11:39:31	20	work.
11:33:08	21	A. It was an 80,000 --	11:39:32	21	MR. TROUT: Okay.
11:33:10	22	THE WITNESS: Will you excuse me, please?	11:39:44	22	Q. (BY MR. TROUT) So as we sit here today, you
11:33:21	23	(Cell phone ringing.)	11:39:57	23	can't verify that an 80,000 square foot building was,
11:33:55	24	(Off the record.)	11:40:03	24	quote, the project described in the contract; correct?
11:33:58	25	THE WITNESS: The question, sir?	11:40:09	25	A. I can't find the reference to it in their
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11:40:11 1 scope of work.  
 11:40:13 2 Q. Okay.  
 11:40:19 3 A. But I'm confident that we have seen either  
 11:40:31 4 in the solicitation for this tender or in another  
 11:40:35 5 place that this was a tender to oversee the  
 11:40:45 6 construction of an 80,000 square foot building to  
 11:40:48 7 Class A office building standards.  
 11:40:52 8 Q. All right. So, let me ask you this  
 11:41:01 9 question: Turning your attention to Exhibit Nos. 86,  
 11:41:09 10 87, or 88, is there anything in those exhibits that  
 11:41:19 11 you contend verifies an 80,000 square foot building as  
 11:41:25 12 the, quote, project described in the contract?  
 11:41:30 13 A. I can't point you to it right now. I guess  
 11:41:35 14 we'd have to study the volumes.  
 11:41:37 15 Q. So you don't know?  
 11:41:38 16 A. No.  
 11:41:50 17 Q. Okay. Now, you say Class A standards; is  
 11:41:51 18 that correct?  
 11:41:51 19 A. Yes.  
 11:41:59 20 Q. All right. Where do I find a document that  
 11:42:06 21 will tell me what a Class A standard building  
 11:42:07 22 contains?  
 11:42:12 23 A. I think it would be necessary to consult  
 11:42:20 24 with real estate people who deal with building  
 11:42:22 25 standards.

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11:42:31 1 Q. All right. So tell me what real estate  
 11:42:36 2 person did you consult with prior to writing your  
 11:42:41 3 opinion in which is contained in Exhibit No. 91?  
 11:42:47 4 A. I didn't consult with any real estate --  
 11:42:47 5 commercial real estate person.  
 11:42:54 6 Q. Okay. So as we sit here today, would I be  
 11:43:00 7 correct in understanding that you can't tell me what's  
 11:43:05 8 contained in a Class A standard building without  
 11:43:07 9 consulting with a real estate person?  
 11:43:07 10 A. That's correct.  
 11:43:20 11 Q. Okay. Did Mr. Bauer tell you that he had  
 11:43:26 12 consulted with some real estate professional prior to  
 11:43:28 13 the preparation of this report?  
 11:43:30 14 A. No, he didn't tell me that.  
 11:43:33 15 Q. Do you know if he did or not?  
 11:43:36 16 A. I don't know that as an absolute.  
 11:43:38 17 Q. Okay.  
 11:43:45 18 A. I do know that the reference to a Class A  
 11:43:52 19 office building is a building similar to the new  
 11:43:56 20 Banner Bank building, and that would have provided a  
 11:44:05 21 great deal of open space, and in that case, energy  
 11:44:10 22 efficiency.  
 11:44:14 23 Q. So let me ask you this question: Turning  
 11:44:21 24 your attention to tab 2 in the binder to your  
 11:44:24 25 immediate right, which is Exhibit No. 2, the

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11:44:26 1 construction management agreement --  
 11:44:27 2 A. Yes.  
 11:44:33 3 Q. -- can you identify for me where you find a  
 11:44:37 4 reference to the Banner Bank building?  
 11:44:39 5 A. It isn't in here.  
 11:44:40 6 Q. Okay.  
 11:44:43 7 A. It is an inquiry that I made myself.  
 11:44:59 8 Q. All right. An inquiry of whom? Did you  
 11:45:01 9 hear me, sir?  
 11:45:04 10 A. I did. I was thinking about it, if you bear  
 11:45:04 11 with me.  
 11:45:09 12 Q. Well, I apologize. You had told me --  
 11:45:12 13 A. Sometimes I can't remember names. But it  
 11:45:16 14 was the owner of the Banner Bank building who built  
 11:45:20 15 it. He lives in Meridian someplace, and I cannot  
 11:45:21 16 remember his name.  
 11:45:24 17 Q. Okay. And when did you make an inquiry of  
 11:45:29 18 the owner of the Banner Bank building?  
 11:45:33 19 A. Early on in my employment in this  
 11:45:36 20 commission.  
 11:45:49 21 Q. Okay. We'll come back to that.  
 11:45:52 22 A. It's Dennis something. I can't think of his  
 11:45:52 23 last name.  
 11:46:12 24 Q. Okay. So let's turn to the next page of  
 11:46:17 25 your opinion.

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11:46:18 1 A. Yes.  
 11:46:25 2 Q. In the first full paragraph of page 2 of  
 11:46:26 3 12 --  
 11:46:26 4 A. Yes, sir.  
 11:46:37 5 Q. -- you state that, "It should be noted that  
 11:46:41 6 Petra's scope of work does not include being the agent  
 11:46:44 7 of the owner in regard to the owner's architect,  
 11:46:47 8 Lombard-Conrad."  
 11:46:47 9 A. Yes.  
 11:46:50 10 Q. "Petra was only required to act as the  
 11:46:54 11 owner's representative in regard to the construction  
 11:46:55 12 contracts."  
 11:46:58 13 Did I read that correctly?  
 11:46:59 14 A. Yes, you did.  
 11:47:04 15 Q. Okay. Did you verify that in some fashion  
 11:47:06 16 before you wrote it?  
 11:47:09 17 A. Well, we looked at Petra's scope of work,  
 11:47:20 18 and I didn't put them in as an agent to oversee the  
 11:47:22 19 architect.  
 11:47:24 20 Q. Okay.  
 11:47:26 21 A. There is a difference between having  
 11:47:32 22 authority over an organization and a duty to  
 11:47:34 23 collaborate with it.  
 11:47:38 24 Q. Well, let's turn to Exhibit No. 2, again, if  
 11:47:40 25 you would, please.

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17 (Pages 232 to 235)

11:47:41 1 A. Okay.  
 11:47:47 2 Q. And if you would turn your attention to  
 11:48:00 3 paragraph 4.1, scope of services.  
 11:48:02 4 A. I'm happy to do that.  
 11:48:13 5 Q. All right. Would you read that section to  
 11:48:15 6 yourself silently.  
 11:48:15 7 (Brief pause from 11:48 a.m. to 11:50 a.m.)  
 11:50:20 8 MR. TROUT: Have you read it, sir?  
 11:50:23 9 THE WITNESS: I'm about three quarters of the way  
 11:50:26 10 through it.  
 11:50:36 11 Okay.  
 11:50:39 12 Q. (BY MR. TROUT) So for our record you have  
 11:50:44 13 just read section 4.1, scope of services in general  
 11:50:51 14 for Petra on this project; correct?  
 11:51:08 15 A. What I was actually reading was 4.41.  
 11:51:11 16 Q. All right. I'm going to ask you to read  
 11:51:18 17 4.1, scope of services.  
 11:51:18 18 A. Okay.  
 11:51:21 19 Q. Signify for me when you are done, if you  
 11:51:24 20 would.  
 11:52:11 21 A. I have now read it.  
 11:52:19 22 Q. All right, sir. Now, if I read your opinion  
 11:52:30 23 correctly, it says, "Petra was only required to act as  
 11:52:31 24 the owner's representative in regard to the  
 11:52:36 25 construction contracts;" correct?

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11:52:36 1 A. Yes.  
 11:52:41 2 Q. And you just read section 4.1 of the  
 11:52:48 3 construction management agreement, and it says, "Owner  
 11:52:53 4 has retained the construction manager to help it  
 11:52:58 5 achieve the objective set forth in section 3.1 above  
 11:53:02 6 by managing and coordinating the design."  
 11:53:06 7 Do you see that language?  
 11:53:08 8 A. Yes.  
 11:53:14 9 Q. Pursuant to section 4.1 of the construction  
 11:53:17 10 management agreement, Petra was responsible for  
 11:53:21 11 managing and coordinating the design, isn't that  
 11:53:25 12 correct, sir?  
 11:53:36 13 A. As far as -- as far as 4.1 goes, I -- there  
 11:53:53 14 is a generally acknowledged fact that the people that  
 11:54:00 15 control payment, control the organization that is  
 11:54:06 16 working either for, against, or along side of, and  
 11:54:13 17 Petra had no knowledge or no control over LCA's  
 11:54:25 18 payment, but LCA, on the other hand, had full  
 11:54:30 19 responsibility to sign off on payment for the  
 11:54:32 20 construction contractors as well as Petra.  
 11:54:35 21 Q. Well, Mr. Lemley, I'm going to ask you my  
 11:54:39 22 direct question one more time, and I would ask you if  
 11:54:46 23 you would be so kind as to answer my direct question.  
 11:54:46 24 A. I will try.  
 11:54:49 25 Q. Contrary to the statement you made in your

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11:54:55 1 opinion, paragraph 4.1 of the construction management  
 11:55:00 2 agreement mandates that Petra will manage and  
 11:55:04 3 coordinate the design for this project, isn't that  
 11:55:06 4 correct?  
 11:55:08 5 MR. WALKER: Objection. Lack of foundation. And  
 11:55:10 6 also asked and answered.  
 11:55:13 7 THE WITNESS: It is correct as far as the  
 11:55:15 8 paragraph goes, yes.  
 11:55:18 9 Q. (BY MR. TROUT) Well, is there some other  
 11:55:22 10 paragraph in the construction management agreement  
 11:55:30 11 that removes that duty from Petra?  
 11:55:30 12 A. I don't believe so.  
 11:55:32 13 Q. All right. Is there --  
 11:55:41 14 A. By the same token, I don't believe there is  
 11:55:49 15 a full assignment of responsibility for all of LCA's  
 11:55:52 16 work to Petra.  
 11:56:00 17 Q. Well, tell me, based on your expertise, what  
 11:56:08 18 managing and coordinating the design means.  
 11:56:16 19 A. Well, it means that in the event you're  
 11:56:23 20 given full access to the architect and his work, or  
 11:56:25 21 the engineer and his work, and you are making  
 11:56:32 22 decisions relative to that organization's work, they  
 11:56:38 23 then have a duty to contractually perform an  
 11:56:44 24 integration of the design as well as the construction  
 11:56:46 25 management.

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11:56:52 1 Q. And this paragraph 4.1 says, "by managing  
 11:56:57 2 and coordinating the design and construction of the  
 11:57:02 3 project on behalf of the owner;" correct?  
 11:57:03 4 A. That's what it says, yes.  
 11:57:07 5 Q. And that's what it intended to have Petra  
 11:57:11 6 do, isn't that a fact, sir?  
 11:57:13 7 MR. WALKER: Objection. Calls for speculation.  
 11:57:16 8 Q. (BY MR. TROUT) It's what the contract says,  
 11:57:18 9 isn't it?  
 11:57:20 10 MR. WALKER: Objection. Argumentative.  
 11:57:21 11 THE WITNESS: That's what the contract says.  
 11:57:23 12 Q. (BY MR. TROUT) All right. And you would  
 11:57:29 13 expect as a construction expert that Petra would be  
 11:57:33 14 required to fulfill what the contract says its duties  
 11:57:35 15 are, wouldn't you?  
 11:57:36 16 A. Yes.  
 11:57:55 17 Q. Now, you just read paragraph 4.1; correct?  
 11:57:56 18 A. Yes.  
 11:58:01 19 Q. And if I take you back to the very first  
 11:58:03 20 page --  
 11:58:06 21 A. Of the --  
 11:58:12 22 Q. -- of your opinion, and take you down to the  
 11:58:19 23 fifth paragraph where you quote the general scope of  
 11:58:27 24 Petra's services --  
 11:58:29 25 A. Yes.

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18 (Pages 236 to 239)

11:58:34	1	Q. -- you don't quote the first full sentence	12:03:24	1	A. -- in what they wanted in the building, and
11:58:38	2	of paragraph 4.1, do you?	12:03:29	2	that's not unusual. And if the City had truly
11:58:39	3	A. I do not.	12:03:34	3	intended Petra to be in the management of the
11:58:47	4	Q. Okay. Can you tell me why it is that you	12:03:41	4	architect, they would have included in Petra's
11:58:55	5	chose in your report submitted to the Court in this	12:03:49	5	responsibilities the need for Petra to approve the
11:59:01	6	case not to include the full description of Petra's	12:03:53	6	architect's progress payments.
11:59:05	7	services, including the first full sentence of	12:04:02	7	Q. So tell me where I find in any written
11:59:09	8	paragraph 4.1?	12:04:09	8	document the need for Petra to approve payments to the
11:59:15	9	A. Because it was my opinion, based on	12:04:16	9	architect to fulfill their management of the design
11:59:23	10	conversations with Petra's on-site people and their	12:04:19	10	for this project.
11:59:29	11	management that they felt they did not have control	12:04:22	11	A. I know of no such writing relative to this
11:59:34	12	over the architect that the City was, in fact, working	12:04:28	12	project, but I do have 50 years of working in similar
11:59:40	13	directly with the architect and not including Petra in	12:04:34	13	situations in which there was an implied
11:59:48	14	those discussions and that would have had the effect	12:04:42	14	responsibility for something and no direct statement
11:59:56	15	allegedly -- if it's true -- and if what they are	12:04:48	15	giving me the right to manage the engineer or the
11:59:59	16	alleging is true, it would have had the effect of	12:04:48	16	architect.
12:00:05	17	undermining anything Petra would say to LCA.	12:04:51	17	Q. All right. So let's turn our attention to
12:00:12	18	Q. Well, what did you do prior to issuing your	12:04:59	18	tab 2 again, section 4.1.
12:00:19	19	opinion to verify whether or not what you were told by	12:05:01	19	A. I just happen to have it here.
12:00:23	20	Petra's employees was true?	12:05:05	20	Q. Is it your contention as Petra's expert that
12:00:31	21	A. We studied the paper from the project that	12:05:17	21	the language of section 4.1, which says, "Owner has
12:00:38	22	we had available to us at the time, and it led us to	12:05:19	22	retained the construction manager to help it achieve
12:00:46	23	believe that because the architect was sitting outside	12:05:25	23	the objectives set forth in section 3.1 above by
12:00:51	24	the umbrella that Petra was supposed to be putting	12:05:31	24	managing and coordinating the design," is not an
12:00:57	25	over the project, that Petra, in fact, did not have	12:05:35	25	express statement of Petra's duty?
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12:01:03	1	control of the architect and the architect's work.	12:05:37	1	MR. WALKER: Objection. Asked and answered.
12:01:04	2	Q. Well --	12:05:40	2	THE WITNESS: The statement and the clause speaks
12:01:12	3	A. And on that basis, that would certainly have	12:05:48	3	for itself, but I would like to see the language of
12:01:14	4	neutered Petra.	12:05:54	4	the architect's contract to see if they were
12:01:42	5	Q. Well, let's talk about that, if we can. If	12:06:02	5	instructed to give full collaboration to Petra here.
12:02:03	6	you turn to page 6 of 12.	12:06:13	6	Q. (BY MR. TROUT) Well, your report -- if you
12:02:04	7	A. Yes.	12:06:32	7	turn to the second page of your transmittal letter,
12:02:06	8	Q. Do you have that, sir?	12:06:43	8	which is Bates No. PETRA9693 in the bottom right hand
12:02:07	9	A. I do.	12:06:45	9	corner.
12:02:14	10	Q. In the first full paragraph, you write,	12:06:48	10	A. Now, what page are we at?
12:02:19	11	"Petra began conferring with the owner and the	12:06:50	11	Q. I'm on the second page of your transmittal
12:02:24	12	architect in September of 2006." It looks to me like	12:06:56	12	letter. Not your opinion. Can you find that, please?
12:02:30	13	Petra was included in meetings with the architect,	12:07:01	13	A. PETRA Bates No. 96945?
12:02:33	14	according to your report; isn't that correct?	12:07:06	14	Q. No. 96939.
12:02:33	15	A. In the beginning.	12:07:13	15	A. Well, I'm in the wrong place. I've found
12:02:36	16	Q. Okay. It doesn't say anywhere in your	12:07:14	16	it.
12:02:41	17	report that Petra was ever excluded from a meeting	12:07:20	17	Q. All right. In preparation of your report,
12:02:46	18	with the architect, does it, sir?	12:07:27	18	according to your transmittal letter, you tell the
12:02:48	19	A. No. And I would like to think that my	12:07:30	19	Court that you reviewed the contract between the City
12:02:58	20	answer to your previous question didn't say that Petra	12:07:37	20	and Petra as well as the City and LCA. That's
12:03:03	21	was excluded from the meeting. There are meetings and	12:07:46	21	Lombard-Conrad; correct?
12:03:08	22	there are meetings so, I guess it would all depend on	12:07:46	22	A. Yes.
12:03:12	23	the substance of the meeting. But I do know that the	12:07:48	23	Q. So tell me what it was in your review of the
12:03:20	24	City was instructing LCA --	12:07:58	24	contract between the City and LCA from which you
12:03:21	25	Q. Well --	12:08:06	25	concluded that LCA did not have a duty to cooperate
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12:08:11	1	with Petra in the management of the design for this	12:11:43	1	sir?
12:08:11	2	project?	12:11:51	2	A. It could be, but it could also be a
12:08:14	3	A. I didn't say they didn't have a duty to	12:11:56	3	representation of a collaboration on a narrow issue
12:08:15	4	cooperate. I think they did.	12:12:02	4	and the overall relationship wasn't what was -- what
12:08:34	5	Q. Okay. Is it your contention as Petra's	12:12:03	5	existed in the narrow issue.
12:08:40	6	expert that you have seen any document which modifies	12:12:06	6	Q. Well, the owner's requirements isn't a
12:08:44	7	the construction management agreement and relieves	12:12:08	7	narrow issue, is it?
12:08:52	8	Petra of its express duty to manage and coordinate the	12:12:09	8	A. Of course not.
12:08:55	9	design for this project?	12:12:13	9	Q. All right. So what you have written here is
12:08:57	10	MR. WALKER: Objection. Asked and answered.	12:12:17	10	that they were collaborating with respect to the
12:09:02	11	THE WITNESS: I don't know that I have a document	12:12:19	11	owner's requirements, isn't that correct.
12:09:11	12	that I can point to at this time.	12:12:21	12	MR. WALKER: Objection. Misstates what the
12:09:11	13	MR. TROUT: Okay.	12:12:24	13	document says. Lack of foundation.
12:09:14	14	Q. (BY MR. TROUT) And if we turn back to page	12:12:25	14	MR. TROUT: Well, I'll clarify the question.
12:09:46	15	6 of 12 of your opinion, in Exhibit No. 91, you say,	12:12:29	15	Q. (BY MR. TROUT) You intended to tell the
12:09:51	16	"Petra began conferring with the owner and the	12:12:35	16	Court that Petra, the owner, and the architect were
12:09:54	17	architect in September of '06;" correct?	12:12:38	17	collaborating with respect to the owner's
12:09:55	18	A. Yes.	12:12:41	18	requirements, isn't that correct, Mr. Lemley?
12:09:58	19	Q. You then say, and I'm assuming you've	12:12:43	19	MR. WALKER: Objection. Lack of foundation.
12:10:05	20	verified, "that meetings were typically weekly and at	12:12:46	20	Misstates what the document says.
12:10:06	21	times more frequently."	12:12:48	21	THE WITNESS: I stand behind what the document
12:10:06	22	A. Yes.	12:12:56	22	says, and rest assured I will have investigated this
12:10:09	23	Q. Did you verify that?	12:13:01	23	very carefully before I have to take it to the Court
12:10:14	24	A. I asked Mr. Bauer what was the frequency of	12:13:02	24	and swear to it.
12:10:16	25	the meetings, and he said, weekly.	12:13:05	25	Q. (BY MR. TROUT) Well, you've already given
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12:10:21	1	Q. And did he also say at times more frequently	12:13:07	1	this to the Court. Did you know that?
12:10:24	2	than weekly?	12:13:07	2	A. Yes.
12:10:27	3	A. He must have, because it's in here. I	12:13:12	3	Q. And you've already sworn to this as part of
12:10:29	4	didn't recall that but ...	12:13:14	4	an affidavit. Did you know that?
12:10:32	5	Q. All right. And did he say that those	12:13:15	5	A. Yes, I did.
12:10:36	6	meetings were between Petra and the owner and the	12:13:20	6	Q. So are you telling me now that you didn't
12:10:41	7	architect as you have written in your opinion?	12:13:23	7	thoroughly investigate it before you gave it to the
12:10:41	8	A. Yes.	12:13:26	8	Court in the form of a sworn affidavit?
12:10:43	9	Q. All right. And then you say in your	12:13:29	9	A. I'm telling you that we investigated it as
12:10:47	10	opinion, "The owner's requirements were provided to	12:13:33	10	far as it was possible to investigate it at the time
12:10:52	11	LCA so that LCA could provide the design;" correct?	12:13:42	11	we signed the affidavit, and we have since then had
12:10:53	12	A. Yes.	12:13:45	12	significant new information provided us.
12:10:57	13	Q. All right. And you say, "The problems were	12:13:46	13	Q. Well --
12:11:01	14	overcome through collaboration at meetings;" is that	12:13:52	14	A. I don't know that it makes a major change to
12:11:02	15	correct?	12:14:03	15	our opinion in any way, but it has raised issues in
12:11:02	16	A. Yes.	12:14:07	16	our two days of deposition that I will be verifying
12:11:06	17	Q. Was that collaborated -- did you verify that	12:14:08	17	carefully.
12:11:11	18	there was collaboration between Petra and LCA and the	12:14:11	18	Q. Well, tell me what it is in the new
12:11:14	19	owner?	12:14:18	19	information that you've received that raises any issue
12:11:17	20	A. I verified it with the minutes of the	12:14:23	20	with respect to whether or not you had the ability to
12:11:27	21	meetings and representations by Petra relative to the	12:14:28	21	verify the collaboration between Petra and LCA at the
12:11:32	22	fact that they were in collaboration at various times	12:14:32	22	time you wrote this report.
12:11:32	23	on the project.	12:14:41	23	A. If I had the opportunity to interview
12:11:36	24	Q. And that kind of collaboration would be part	12:14:49	24	Lombard-Conrad, I would have a much better and
12:11:41	25	of managing and coordinating the design, would it not,	12:14:58	25	insightful opinion about what this collaboration as
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12:15:06	1	opposed to management of LCA by Petra.	12:19:10	1	Q. Well, Mr. Lemley, very directly, you did not
12:15:12	2	Q. Well, let me ask you this, sir: What effort	12:19:14	2	say anything about an assignment of the LCA contract
12:15:17	3	did you make to interview Lombard-Conrad before you	12:19:16	3	in your report; correct?
12:15:21	4	signed your affidavit and signed this report?	12:19:17	4	A. I did not.
12:15:24	5	A. I didn't make any effort to do that.	12:19:19	5	Q. Okay.
12:15:30	6	Q. All right. What prevented you from making	12:19:22	6	MR. WALKER: Are we going to take a lunch break
12:15:34	7	an effort to interview Lombard-Conrad before you	12:19:23	7	sometime?
12:15:39	8	signed your affidavit and signed this report?	12:19:26	8	MR. TROUT: Yeah. I think now is a good time to
12:15:42	9	A. Time constraints.	12:19:28	9	take a lunch break.
12:15:48	10	Q. Okay.	12:19:31	10	THE WITNESS: It seems to me on the face of it a
12:15:51	11	A. I do have other matters that I have to	12:19:34	11	bright lawyer like yourself would have drawn that
12:15:53	12	attend to.	12:19:38	12	conclusion without it having been written in the
12:15:56	13	Q. Well, did you instruct Mr. Bauer to	12:19:38	13	report.
12:15:59	14	interview Lombard-Conrad before this report was	12:19:41	14	MR. TROUT: Well, I appreciate the compliment,
12:15:59	15	written?	12:19:44	15	sir. I assume it was intended as one.
12:16:04	16	A. I told him to verify the statements made in	12:19:46	16	THE WITNESS: It was.
12:16:09	17	the report and to assure himself that they were	12:19:48	17	MR. TROUT: Good. Let's take our lunch break.
12:16:10	18	absolutely correct.	12:19:54	18	We'll be back here at 1:15.
12:16:19	19	Q. Okay. So can you tell me why it is when	12:19:58	19	THE WITNESS: We've had a couple days to get to
12:16:24	20	Mr. Bauer was verifying the statements made in this	12:20:00	20	know one another.
12:16:29	21	report he failed to include the language of section	12:20:05	21	MR. TROUT: Yes, we have. We'll be back at 1:15.
12:16:34	22	4.1 regarding the duty of Petra to manage and	12:20:05	22	We'll go off the record.
12:16:37	23	coordinate the design?	12:20:05	23	(Recess taken from 12:20 p.m. to 1:23 p.m.)
12:16:39	24	MR. WALKER: Objection. Calls for speculation.	13:24:07	24	MR. TROUT: Back on the record.
12:16:42	25	THE WITNESS: I would have to inquire of	13:24:11	25	THE WITNESS: I want the record to show I did get
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12:16:50	1	Mr. Bauer as to his state of mind at the time he wrote	13:24:18	1	a good lunch today. Tom was very generous.
12:16:58	2	that aspect of this or represented it to me so that I	13:24:20	2	MR. TROUT: That's good, sir. I hope you are
12:17:02	3	included in that form in this report.	13:24:21	3	feeling well.
12:17:04	4	Q. (BY MR. TROUT) Well, you would agree with	13:24:23	4	THE WITNESS: I am indeed.
12:17:09	5	me, would you not, sir, if we look at page 2 of 12 of	13:24:27	5	Q. (BY MR. TROUT) Let's go to where we were in
12:17:22	6	your opinion, the first full paragraph --	13:24:33	6	your report, Exhibit No. 91, and let's go again to
12:17:24	7	A. Yes, sir.	13:24:43	7	page 6 of 12, if you would, please.
12:17:28	8	Q. -- where you write, "Petra was only required	13:24:51	8	A. Well, let's see if I can do this. I'm doing
12:17:33	9	to act as the owner's representative in regard to the	13:25:01	9	something wrong here. Have I got the right binder?
12:17:44	10	construction contracts," that does not comport with	13:25:02	10	MR. WALKER: Yep.
12:17:47	11	section 4.1 of the construction management agreement,	13:25:08	11	Q. (BY MR. TROUT) You should be in Exhibit
12:17:48	12	does it, sir?	13:25:15	12	No. 91 --
12:17:51	13	MR. WALKER: Objection. Asked and answered. And	13:25:18	13	MR. WALKER: Oh, I think you might be in the
12:17:52	14	also lack of foundation.	13:25:18	14	wrong binder.
12:17:59	15	THE WITNESS: One of the things that led me to	13:25:25	15	THE WITNESS: All right. There we are. Now, we
12:18:11	16	believe that Petra didn't have a -- an absolute	13:25:29	16	got the right binder and the right section.
12:18:19	17	responsibility to manage Petra's -- and Petra's design	13:25:31	17	MR. TROUT: Let's let the record reflect that
12:18:26	18	is the fact that the contract for the architect was	13:25:34	18	Mr. Walker had to find the exhibit for the witness.
12:18:36	19	held by Meridian and there was no assignment from	13:25:39	19	Q. (BY MR. TROUT) Mr. Lemley, turning your
12:18:43	20	Meridian as to any specific aspect of that contract	13:25:47	20	attention in Exhibit No. 91 to page 6 of 12.
12:18:55	21	being covered under Petra's responsibilities.	13:25:49	21	A. Okay. I have it.
12:18:57	22	Q. (BY MR. TROUT) Well, you didn't say that in	13:25:54	22	Q. In the first full paragraph on page 6 of 12,
12:19:00	23	your report, did you, sir?	13:25:57	23	you write, "The owner's requirements were provided to
12:19:03	24	A. I'm sitting here today trying to clarify the	13:25:59	24	LCA."
12:19:07	25	issues that you are bringing up and asking me about.	13:26:01	25	Do you see that, sir?
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13:26:02	1	A. Yes.	13:33:22	1	Q. Okay. And is it your testimony under oath
13:26:14	2	Q. All right. Utilizing Exhibits 86, 87, or	13:33:26	2	today that those documents verifying that quotation
13:26:20	3	88, will you please identify for me Lemley	13:33:34	3	are contained and Exhibits 86, 87, or 88?
13:26:28	4	International's verification for that statement.	13:33:36	4	MR. WALKER: Objection. Lack of foundation.
13:26:33	5	A. Well, I can try. It's been a long time	13:33:38	5	THE WITNESS: I don't know.
13:26:42	6	since I've looked at this but -- that's Volume 1 --	13:33:38	6	MR. TROUT: All right.
13:26:48	7	Q. To your immediate right is Exhibits 86, 87,	13:33:45	7	Q. (BY MR. TROUT) Well, did you not represent
13:26:51	8	or 88, which are the volumes you brought along with	13:33:51	8	to me in your first portion of your deposition that
13:26:55	9	you to your first deposition.	13:33:56	9	Exhibits 86, 87, and 88 were all of the documents upon
13:27:58	10	A. Yes.	13:33:59	10	which Lemley International relied upon in the
13:30:00	11	(Brief pause from 1:26 p.m. to 1:30 p.m.)	13:34:04	11	preparation of this report?
13:30:02	12	THE WITNESS: Presumably the architect's contract	13:34:08	12	A. Yes. And I said also, we relied on
13:30:07	13	is in here, but I have no knowledge of where it is.	13:34:14	13	discussions that we had had with Petra and their site
13:30:09	14	Q. (BY MR. TROUT) Tell me why you are looking	13:34:22	14	people as well as their management organization.
13:30:12	15	for the architect's contract?	13:34:26	15	Q. And what discussions did you have with
13:30:17	16	A. Well, that would -- the architect's contract	13:34:33	16	Petra's personnel that you didn't relate to me this
13:30:23	17	would relate who they were to work with and how they	13:34:34	17	morning?
13:30:30	18	got their instructions as to what the City of Meridian	13:34:38	18	A. None that I remember at this time.
13:30:30	19	wanted.	13:34:49	19	Q. Okay. So as we sit here today, you don't
13:30:35	20	Q. Well, that really wasn't my question. My	13:34:55	20	have the ability to verify that there is documentation
13:30:49	21	question was: Utilizing Exhibits 86, 87, or 88, can	13:34:59	21	which verifies that the owner's requirements were
13:30:56	22	you please identify for me how you verified your	13:35:02	22	provided to LCA; is that correct?
13:30:59	23	statement that, "The owner's requirements were	13:35:17	23	A. I can't personally turn to the document. It
13:31:04	24	provided to LCA"?	13:35:23	24	would take several hours for me to go through all of
13:31:12	25	A. I think it is fair to say that Mr. Bauer	13:35:31	25	these documents to find the appropriate paper.
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13:31:20	1	found the documentations, and I used common sense that	13:35:40	1	Q. Okay. So let's turn to the next sentence in
13:31:25	2	an architect does normally take instruction from an	13:35:41	2	page 6 of 12.
13:31:29	3	owner.	13:35:42	3	A. Yes.
13:31:35	4	Q. Well, my question, sir, is: Did you	13:35:45	4	Q. First full paragraph. You say the problems
13:31:38	5	personally verify the statement that "The owner's	13:35:51	5	were overcome through collaboration; is that correct?
13:31:42	6	requirements were provided to LCA"?	13:35:52	6	A. Yeah. That is correct.
13:31:43	7	A. No.	13:35:59	7	Q. Okay. Tell me each and every problem that
13:31:49	8	Q. All right. And will you identify for me in	13:36:04	8	you contend was overcome through collaboration.
13:31:54	9	either Exhibit No. 86, 87, or 88 where Mr. Bauer	13:36:13	9	A. Well, the identification and removal of
13:32:01	10	verified that through a document?	13:36:18	10	hazardous waste, and the subsequent change order that
13:32:06	11	A. Well, I can thumb through each of the pages.	13:36:27	11	was issued, that was a collaborative effort between
13:32:12	12	I don't have any other way of finding such	13:36:40	12	City administration and Petra.
13:32:13	13	verification.	13:36:44	13	Q. Well, let me ask you this question: Is it
13:32:16	14	Q. Well, this is your report, and they are your	13:36:50	14	your contention as Petra's expert that hazardous waste
13:32:23	15	documents. I have assumed that your familiarity with	13:36:56	15	was part of the owner's requirements?
13:32:27	16	them allowed you to sign this report; is that correct?	13:36:56	16	A. Yes.
13:32:32	17	A. Not necessarily. I went through them, and	13:37:02	17	Q. All right. Other than hazardous waste, what
13:32:43	18	as I drafted the report, I did it in consultation with	13:37:09	18	other problems are you referring to in paragraph 1 on
13:32:50	19	Mr. Bauer, who found references, showed them to me. I	13:37:13	19	page 6 of 12?
13:32:55	20	read them and incorporated some of these statements in	13:37:27	20	A. When you say paragraph 1, you're --
13:32:56	21	my report.	13:37:30	21	Q. I'm talking about the first full paragraph
13:32:59	22	Q. So is it your testimony under oath today	13:37:34	22	on page 6 of 12. The one we've just been reading
13:33:05	23	that Mr. Bauer showed you documents that verified	13:37:37	23	from. The last full sentence --
13:33:14	24	that, "The owner's requirements were provided to LCA"?	13:37:40	24	A. This is the one following the bullet point?
13:33:15	25	A. Yes.	13:37:41	25	Q. That's correct.
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<p>13:37:42 1 A. All right.</p> <p>13:37:44 2 Q. The last full sentence says, "The problems</p> <p>13:37:47 3 were overcome through collaboration." I want to know</p> <p>13:37:52 4 what, other than hazardous waste, were the problems</p> <p>13:37:55 5 that you identified which were overcome through</p> <p>13:37:57 6 collaboration?</p> <p>13:38:08 7 A. My experience with projects like this would</p> <p>13:38:15 8 call for a construction manager and the owner's</p> <p>13:38:26 9 representative to anticipate and work together to find</p> <p>13:38:31 10 solutions to issues that were scheduled to be</p> <p>13:38:40 11 encountered as they went forward. There was a clay</p> <p>13:38:53 12 layer that it was agreed they -- they didn't want to</p> <p>13:38:56 13 penetrate before the hazardous material was removed</p> <p>13:39:03 14 from the site, that, plus a water table caused the</p> <p>13:39:12 15 floor of the added basement to be raised four feet.</p> <p>13:39:19 16 Those things were done in a collaborative way.</p> <p>13:39:25 17 Q. Okay. Other than hazardous waste and a clay</p> <p>13:39:31 18 layer, what other problems are you identifying in the</p> <p>13:39:36 19 first full paragraph on page 6 of 12?</p> <p>13:39:49 20 A. Well, I am aware that there was a</p> <p>13:39:55 21 requirement for a clear span over the City Council</p> <p>13:40:04 22 chambers so no columns would interrupt the people</p> <p>13:40:12 23 attending a City Council meetings ability to see</p> <p>13:40:19 24 everything going on in the room. And that -- that was</p> <p>13:40:29 25 a change outside of the instruction that was given</p> <p style="text-align: right;">Page 256</p>	<p>13:44:06 1 that may be exactly what I was trying to say, that</p> <p>13:44:10 2 the -- there was a lot of the coordination issues that</p> <p>13:44:19 3 were covered in discussions between City</p> <p>13:44:24 4 representatives, the architect, and Petra.</p> <p>13:44:30 5 Q. (BY MR. TROUT) Well, you said in your</p> <p>13:44:38 6 testimony, if I understood you correctly, that the</p> <p>13:44:48 7 clear span city council chamber was a change that was</p> <p>13:44:52 8 different than what was contemplated in the</p> <p>13:44:55 9 construction management agreement; is that correct?</p> <p>13:44:56 10 A. That was my understanding.</p> <p>13:44:59 11 Q. Okay. So show me in the construction</p> <p>13:45:05 12 management agreement what was contemplated for the</p> <p>13:45:08 13 city council chambers?</p> <p>13:45:13 14 A. I can't show you the designs and</p> <p>13:45:17 15 specifications, because they are not in that</p> <p>13:45:18 16 construction management agreement.</p> <p>13:45:31 17 Q. All right. Well, tell me what document you</p> <p>13:45:39 18 looked at to determine what the original design for</p> <p>13:45:50 19 the city council chambers was contemplated to be.</p> <p>13:45:51 20 A. I can't do that.</p> <p>13:45:54 21 Q. Why?</p> <p>13:45:56 22 A. I have no recollection of where I saw it.</p> <p>13:46:00 23 Q. Okay. Do you have a recollection of seeing</p> <p>13:46:02 24 it?</p> <p>13:46:10 25 A. I have a recollection of being advised that</p> <p style="text-align: right;">Page 258</p>
<p>13:40:40 1 Petra when they undertook this commission, in addition</p> <p>13:40:50 2 to trying to qualify the buildings for LEED</p> <p>13:40:56 3 certification, which was an added issue as well, and</p> <p>13:41:02 4 all those -- or those issues would have to be talked</p> <p>13:41:09 5 out and agreed between the parties to this that -- the</p> <p>13:41:11 6 owner, the architect, and Petra.</p> <p>13:41:19 7 Q. Okay. So let's talk about the clear span in</p> <p>13:41:20 8 the council chambers.</p> <p>13:41:20 9 A. Yes.</p> <p>13:41:25 10 Q. If you would, sir, if you would take the</p> <p>13:41:30 11 binder, which has Exhibit No. 2 in it, please. It is</p> <p>13:41:35 12 the one immediately to your right, I believe.</p> <p>13:41:35 13 A. Okay.</p> <p>13:41:39 14 Q. And if you would turn to the second tab,</p> <p>13:41:42 15 which is Exhibit No. 2.</p> <p>13:41:43 16 A. Yes.</p> <p>13:41:46 17 Q. All right. This is the construction</p> <p>13:41:48 18 management agreement?</p> <p>13:41:48 19 A. Yes.</p> <p>13:41:51 20 Q. Okay. Would you identify for me in the</p> <p>13:41:58 21 construction management agreement where it contains a</p> <p>13:42:04 22 description for the City Council chambers.</p> <p>13:43:21 23 (Brief pause from 1:42 p.m. to 1:43 p.m.)</p> <p>13:43:54 24 THE WITNESS: I'm not sure that it is in black</p> <p>13:43:59 25 letter law in this construction manager's agreement,</p> <p style="text-align: right;">Page 257</p>	<p>13:46:13 1 that was the case. Now, whether it was a document I</p> <p>13:46:18 2 looked at or whether Mr. Bauer advised me, I can't</p> <p>13:46:18 3 answer today.</p> <p>13:46:24 4 Q. All right. Well, did Mr. Bauer tell you</p> <p>13:46:27 5 what document he looked at to determine what the</p> <p>13:46:30 6 original design for the city council chambers would</p> <p>13:46:32 7 be?</p> <p>13:46:35 8 A. No, he didn't tell me.</p> <p>13:46:37 9 Q. All right. Did you ask him?</p> <p>13:46:39 10 A. No, I didn't.</p> <p>13:46:47 11 Q. Okay. And did you have a discussion with</p> <p>13:46:51 12 respect to the city council chambers with any other</p> <p>13:46:53 13 member of your staff?</p> <p>13:46:54 14 A. No.</p> <p>13:47:16 15 Q. Okay. Other than the hazardous waste, the</p> <p>13:47:23 16 clay layer, and the city council chambers, and LEED</p> <p>13:47:26 17 certification, can you tell me what other problems you</p> <p>13:47:30 18 are referring to in the first full paragraph of page 6</p> <p>13:47:36 19 of 12 of your opinion, which is Exhibit No. 91?</p> <p>13:47:37 20 A. No.</p> <p>13:48:05 21 Q. Okay. I'll ask that in a slightly different</p> <p>13:48:19 22 way. Turning your attention, sir, back to page 2 of</p> <p>13:48:36 23 12 of your report.</p> <p>13:48:36 24 A. Yes, sir.</p> <p>13:48:43 25 Q. In the second full paragraph, you say, "The</p> <p style="text-align: right;">Page 259</p>

13:48:46	1	project described in the Petra contract was simply	13:53:12	1	A. Yes.
13:48:48	2	never designed."	13:53:19	2	Q. All right, sir. Is the word, building,
13:48:50	3	Do you see that, sir?	13:53:25	3	utilized in Recital B in any fashion?
13:48:51	4	A. I do.	13:53:25	4	A. No.
13:49:04	5	Q. Okay. Tell me what you did to verify that	13:53:36	5	Q. All right. So tell me, sir, what document,
13:49:07	6	the project described in the Petra contract was simply	13:53:42	6	other than the construction management agreement, do
13:49:10	7	never designed?	13:53:52	7	you rely upon for your repeated recitation in your
13:49:16	8	A. Well, Petra was led to believe that they	13:54:01	8	report that an 80,000 square foot building was
13:49:24	9	were to manage a relatively simple four-story, 80,000	13:54:06	9	contemplated by Petra?
13:49:41	10	square foot Class A office building, and LCA prepared	13:54:18	10	A. There was an agreement at the time that the
13:49:47	11	a design for a building consisting of three stories,	13:54:30	11	City and its administration selected a construction
13:49:53	12	plus a basement, total of approximately 100,000 square	13:54:36	12	manager to select one that had experience in building
13:49:57	13	feet. That was the difference between what Petra	13:54:43	13	buildings, and the interference, I think, is clear
13:50:04	14	thought they were being retained to manage versus what	13:54:48	14	that it was 80,000 square feet of standard Class A
13:50:07	15	was --	13:54:53	15	office space. Now, that would be in a building, not a
13:50:09	16	Q. Well, let's take it --	13:55:06	16	mechanical shop. So I think this is clearly a --
13:50:15	17	A. -- constructed and the LEED silver	13:55:11	17	representing a building, not a mechanical shop.
13:50:15	18	certification.	13:55:15	18	Q. Well, my question to you was, since the word
13:50:19	19	Q. All right. Let's take it one item if we	13:55:21	19	building isn't use in Recital B of Exhibit No. 2, are
13:50:22	20	can, Mr. Lemley?	13:55:25	20	you relying on some other document for your conclusion
13:50:23	21	A. Any way you like.	13:55:32	21	that this was to be an 80,000 square foot building?
13:50:27	22	Q. This morning you were unable to locate any	13:55:45	22	A. I'm relying on the recital that says the
13:50:30	23	reference in the construction management agreement to	13:55:50	23	owner desires to abate and demolish the existing
13:50:33	24	an 80,000 square foot building.	13:55:56	24	structures on the site and develop a new city hall
13:50:34	25	Remember that?	13:56:04	25	facility thereon consisting of a four-story structure
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13:50:37	1	A. I remember I had difficulty referring you to	13:56:09	1	with approximately 80,000 square feet of standard
13:50:44	2	it. It's in the recitals, not in the body of the	13:56:16	2	Class A office space. That says about as clearly as
13:50:47	3	contract, so ...	13:56:24	3	you can say that -- about what the owner wants in this
13:50:51	4	Q. All right. Let's turn to Exhibit No. 2.	13:56:25	4	project.
13:50:56	5	And I'm assuming you learned that from Mr. Walker	13:56:33	5	Q. Well, based upon your experience, sir, can
13:50:59	6	during one of the breaks; is that correct?	13:56:42	6	you put 80,000 square feet of useful office space
13:51:00	7	A. It was. It is.	13:56:48	7	inside a building envelope that is only 80,000 square
13:51:13	8	Q. All right. So let's turn to Exhibit No. 2.	13:56:49	8	feet?
13:51:19	9	Do you have that in front of you?	13:56:54	9	MR. WALKER: Objection. Lack of foundation.
13:51:36	10	A. Is it this binder here?	13:56:57	10	Also vague as to the use of the term, useful.
13:51:46	11	Q. Can you find the construction management	13:57:00	11	THE WITNESS: It would be very difficult.
13:51:49	12	agreement, Mr. Lemley?	13:57:03	12	Q. (BY MR. TROUT) It would be impossible,
13:51:51	13	A. Yes. I have it in front of me.	13:57:05	13	wouldn't it, sir?
13:52:09	14	Q. All right. So let's turn to the recitals.	13:57:07	14	MR. WALKER: Objection. Argumentative.
13:52:09	15	A. Yes.	13:57:10	15	THE WITNESS: Impossible is a very big word, and
13:52:16	16	Q. All right. And directing your attention to	13:57:14	16	I seldom accept that anything is impossible.
13:52:21	17	Exhibit No. 2, Recitals B; construction management	13:57:15	17	MR. TROUT: Okay.
13:52:25	18	agreement. Would you read that silently to yourself.	13:57:19	18	Q. (BY MR. TROUT) Well, you know that this was
13:52:25	19	A. Yes.	13:57:26	19	intended to be a city hall; correct?
13:52:54	20	Q. And then indicate when you are done.	13:57:27	20	A. I did.
13:52:55	21	A. I'm finished.	13:57:30	21	Q. And based upon your experience, you know
13:52:58	22	Q. All right, sir. Would you agree with me,	13:57:34	22	that a city hall would have a city council chamber;
13:53:04	23	sir, that the specific language of Recital B is	13:57:35	23	correct?
13:53:10	24	"80,000 square feet of standard Class A office space."	13:57:35	24	A. Yes.
13:53:12	25	Did I read that correctly?	13:57:36	25	Q. All right. And it would have to have
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13:57:39	1	restrooms; is that correct?	14:00:03	1	A. I may have. I'll have to look.
13:57:39	2	A. Yes.	14:00:05	2	Q. Would you please?
13:57:45	3	Q. And in order to be ADA compliant, it would	14:00:06	3	A. I will.
13:57:46	4	have to have elevators?	14:00:08	4	Q. I'd like to see that. Do you think having
13:57:46	5	A. Yes.	14:00:14	5	an office at the bottom of the elevator shaft in a
13:57:49	6	Q. And stairwells?	14:00:19	6	city hall is an acceptable use of that space?
13:57:49	7	A. Correct.	14:00:22	7	A. I would think it would be a stretch to call
13:57:54	8	Q. All of those components would take up square	14:00:23	8	it acceptable.
13:57:58	9	footage in the building footprint, would they not,	14:00:50	9	Q. Okay. Now, turning your attention to page 2
13:57:59	10	sir?	14:00:54	10	of 12 of your opinion again.
13:58:00	11	A. That's correct.	14:00:54	11	A. Yes, sir.
13:58:03	12	Q. And you can't use a stairwell for office	14:01:13	12	Q. In the first -- or excuse me, second full
13:58:05	13	space, can you?	14:01:17	13	paragraph, you say, "instead of standard Class A
13:58:06	14	A. I wouldn't think so.	14:01:17	14	office space."
13:58:10	15	Q. And you can't use a restroom for office	14:01:18	15	Do you see that, sir?
13:58:12	16	space, can you?	14:01:21	16	A. No. Let me continue to look here.
13:58:13	17	A. I don't believe you could.	14:01:33	17	Q. It's in the middle of the paragraph.
13:58:18	18	Q. Can you use an elevator shaft for office	14:01:34	18	A. Yes. Go ahead.
13:58:18	19	space?	14:01:37	19	Q. Would I be correct in understanding that a
13:58:22	20	A. I haven't thought about it. I will think	14:01:46	20	city hall would, in addition to a council chamber,
13:58:23	21	about it.	14:01:57	21	likely have an exterior cladding of some kind?
13:58:26	22	Q. Well, thinking about it right now, do you	14:01:57	22	A. Yes.
13:58:30	23	think an elevator shaft is useful office space?	14:02:00	23	Q. Would it likely have a mechanical system?
13:58:32	24	MR. WALKER: Objection to the use of the term	14:02:01	24	A. Yes.
13:58:34	25	"useful" as being vague.	14:02:06	25	Q. Would it likely have an electrical system?
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13:58:37	1	THE WITNESS: Depending on how large the elevator	14:02:07	1	A. Yes.
13:58:42	2	is and how frequently it travels from the bottom of	14:02:13	2	Q. Tell me, sir, you say that there were,
13:58:45	3	its run to the top.	14:02:17	3	quote, special features; is that right?
13:58:48	4	Q. (BY MR. TROUT) So you'd be okay in having	14:02:18	4	A. Yes.
13:58:53	5	your office in an elevator shaft, is that what you are	14:02:23	5	Q. Okay. So help me understand where it is
13:58:54	6	telling the Court?	14:02:30	6	that I can find a written definition for standard
13:58:55	7	MR. WALKER: Objection. Argumentative.	14:02:36	7	Class A office space, as you've used that term?
13:58:58	8	THE WITNESS: I would not have a problem with	14:02:38	8	MR. WALKER: Objection. Asked and answered.
13:59:03	9	that. I've had my office at the bottom of the shaft	14:02:44	9	THE WITNESS: I suggested to you that a senior
13:59:07	10	with an elevator in it that ran regularly.	14:02:50	10	commercial real estate person would be able to answer
13:59:08	11	MR. TROUT: Okay.	14:02:53	11	that question better than I could.
13:59:13	12	Q. (BY MR. TROUT) Where was that?	14:02:53	12	MR. TROUT: Okay.
13:59:17	13	A. It was in the city of New York. I was in	14:03:02	13	Q. (BY MR. TROUT) So tell me where I would
13:59:21	14	charge of driving a 13-and-a-half mile long tunnel.	14:03:09	14	find in Exhibit No. 2, the construction management
13:59:31	15	We had 44 vertical shafts, and Shaft 7B located	14:03:13	15	agreement, what was contemplated at the time it was
13:59:37	16	along -- next to the Harlem River, I had an office at	14:03:21	16	signed for the exterior cladding of this building.
13:59:43	17	the bottom of the shaft, and the elevator there, not	14:03:27	17	A. I'm not sure that it had been specified at
13:59:48	18	only hauled personnel, it hauled equipment up and down	14:03:27	18	that time.
13:59:51	19	the shaft, and I found the office quite satisfactory.	14:03:40	19	Q. Okay. You say a 200-year exterior cladding.
13:59:53	20	Q. Okay. Was your office within the envelope	14:03:42	20	Do you see that, sir?
13:59:55	21	of the shaft itself?	14:03:43	21	A. I do.
13:59:56	22	A. Yes.	14:03:50	22	Q. Will you show me in Exhibits 86, 87, or 88
13:59:57	23	Q. Oh, it was?	14:03:55	23	where you verified that reference?
13:59:57	24	A. Yes.	14:03:59	24	A. No, I can't show you that. That's something
14:00:01	25	Q. Okay. Do you have photos?	14:04:04	25	that I would need to consult Mr. Bauer on.
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14:04:08 1 Q. Okay. So would it be your testimony today  
 14:04:18 2 that there is a document in Exhibit 86, 87, or 88 that  
 14:04:24 3 defines what a 200-year exterior cladding is?  
 14:04:28 4 A. I'm not sure that there is a clear  
 14:04:32 5 definition of it. I am certain that there was a  
 14:04:42 6 request for a 200-year exterior cladding, and that  
 14:04:49 7 would then have to be discussed between the owner, the  
 14:04:51 8 architect, and the construction manager.  
 14:04:55 9 Q. Okay. How are you certain that there was a  
 14:05:00 10 request for a 200-year exterior cladding? Upon what  
 14:05:03 11 do you rely for that statement?  
 14:05:03 12 A. Mr. Bauer.  
 14:05:07 13 MR. TROUT: Okay. Let's take a five-minute break  
 14:05:09 14 and I think we'll move now.  
 14:15:27 15 (Recess taken from 2:05 p.m. to 2:15 p.m.)  
 14:15:28 16 MR. TROUT: Back on the record.  
 14:15:37 17 Q. (BY MR. TROUT) Turning your attention  
 14:16:01 18 again, sir, to page 2 of 12 of your report.  
 14:16:06 19 A. Where are you?  
 14:16:32 20 Q. Exhibit 91, sir.  
 14:16:35 21 A. Exhibit 1. Exhibit 81. Is it in here where  
 14:17:27 22 the green tab is? There is 89, 90, 91. I'm getting  
 14:17:33 23 it now. Okay. I'm at Exhibit 91.  
 14:17:37 24 Q. All right. Would you turn to page 2 of 12  
 14:17:41 25 of your report.

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14:17:41 1 A. Yes, sir.  
 14:18:01 2 Q. All right. In the last -- well, second full  
 14:18:06 3 paragraph, first sentence. We were just discussing  
 14:18:16 4 the project described in the Petra contract. What, if  
 14:18:16 5 anything --  
 14:18:18 6 A. The last full paragraph?  
 14:18:22 7 Q. No, sir. The first sentence of the second  
 14:18:23 8 full paragraph.  
 14:18:29 9 A. Okay. It starts with LCA architects?  
 14:18:35 10 Q. No. The next paragraph down, if you would,  
 14:18:36 11 please.  
 14:18:38 12 A. Oh, okay. The project described?  
 14:18:40 13 Q. Yes, sir.  
 14:18:40 14 A. Yes, sir.  
 14:18:53 15 Q. What, if anything, did you do to verify what  
 14:19:04 16 design existed as of August 1st, 2006?  
 14:19:12 17 A. I inquired of Petra's people and asked them  
 14:19:21 18 if they had the full design of the building. I was  
 14:19:26 19 told, no, they had not. They had only the description  
 14:19:32 20 as it is carried in our report.  
 14:19:42 21 Q. Well, are you referring to the description  
 14:19:51 22 contained in the construction management agreement?  
 14:20:00 23 A. I was relying pretty much on that and our  
 14:20:07 24 conversations about what was built as opposed to what  
 14:20:09 25 they thought was going to be built.

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14:20:23 1 Q. Well, did you find some document upon which  
 14:20:33 2 Petra relied in concluding what it is they thought was  
 14:20:35 3 going to be built?  
 14:20:36 4 A. No.  
 14:21:01 5 Q. Okay. Did you make any inquiry with  
 14:21:07 6 Lombard-Conrad as to what plans and specifications  
 14:21:14 7 existed as of August 1, 2006?  
 14:21:14 8 A. No.  
 14:21:25 9 Q. Okay. Did you, prior to signing this  
 14:21:36 10 report, review any plans and specifications for this  
 14:21:38 11 project?  
 14:21:51 12 A. No. Only the general description that I  
 14:21:52 13 talked about previously.  
 14:21:56 14 Q. Okay. Turning your attention to the third  
 14:22:02 15 full paragraph that begins, "Petra prepared and  
 14:22:03 16 submitted estimates."  
 14:22:05 17 A. Yes, I see that.  
 14:22:13 18 Q. All right, sir. Would you tell me, sir,  
 14:22:22 19 what, if any, document you relied upon to determine  
 14:22:29 20 whether or not Petra performed value engineering, and  
 14:22:35 21 could you identify that for me out of Exhibits 86, 87,  
 14:22:36 22 or 88?  
 14:22:37 23 A. No.  
 14:22:40 24 Q. Why not?  
 14:22:46 25 A. Because I worked through Mr. Bauer.

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14:22:58 1 Q. Okay. Can you tell me, as Petra's expert,  
 14:23:04 2 when value engineering was required?  
 14:23:11 3 A. Value engineering should have been performed  
 14:23:23 4 from the first day that any designs were received from  
 14:23:34 5 the owner or the architect and improvements looked for  
 14:23:48 6 that would save on the cost of the overall facility.  
 14:23:52 7 Q. So I understand you think that's what should  
 14:23:56 8 have happened. What I want to know is as Petra's  
 14:24:00 9 expert you have stated that "Petra prepared and  
 14:24:02 10 submitted estimates as well as performed the value  
 14:24:07 11 engineering for the design provided by LCA at the  
 14:24:09 12 various design phases as required."  
 14:24:11 13 Do you see that, sir?  
 14:24:11 14 A. Yes.  
 14:24:15 15 Q. Did I read it correctly?  
 14:24:16 16 A. Yes.  
 14:24:22 17 Q. All right. So tell me when, pursuant to  
 14:24:28 18 Petra's contractual obligations, was value engineering  
 14:24:34 19 required?  
 14:24:43 20 A. From my perspective, it was required from  
 14:24:45 21 the day they signed the contract.  
 14:24:55 22 Q. Okay. So that may be from your perspective.  
 14:25:00 23 My question is: Can you tell me from the documents in  
 14:25:05 24 Exhibits 86, 87, or 88 when value engineering was  
 14:25:11 25 required of Petra for this project?

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26 (Pages 268 to 271)

14:25:12 1 A. No.  
 14:25:16 2 Q. Why not?  
 14:25:17 3 A. I don't have a recall of it.  
 14:25:25 4 Q. Okay. So is it your testimony, sir, that  
 14:25:28 5 you verified when value engineering was required  
 14:25:35 6 before you wrote this sentence in your opinion?  
 14:25:42 7 A. Yes. Mr. Bauer did all of the reference  
 14:25:52 8 work, and then he and I discussed the issues, and his  
 14:26:00 9 research comported with my belief relative to good  
 14:26:00 10 practice.  
 14:26:04 11 Q. Well, tell me what research Mr. Bauer did  
 14:26:08 12 with respect to this issue.  
 14:26:13 13 A. Well, he would research the contracts and  
 14:26:16 14 any communications between the owner and Petra with  
 14:26:18 15 regard to this.  
 14:26:30 16 Q. All right. And would I be correct in  
 14:26:33 17 understanding that all of his research is contained in  
 14:26:36 18 Exhibits 86, 87, and 88?  
 14:26:39 19 A. To the best of my knowledge, they are.  
 14:27:18 20 Q. All right. In the last full paragraph of  
 14:27:23 21 page 2 of 12, you say, "The project differs  
 14:27:27 22 significantly from the project described in Petra's  
 14:27:28 23 contract."  
 14:27:30 24 Do you see that language?  
 14:27:30 25 A. Yes.

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14:27:40 1 Q. Okay. So taking Exhibit No. 2 in front of  
 14:27:41 2 you --  
 14:27:42 3 A. Yes.  
 14:27:45 4 Q. -- which is the construction management  
 14:27:48 5 agreement -- okay?  
 14:27:48 6 A. Yes, sir.  
 14:27:58 7 Q. I want you to identify for me from Exhibit  
 14:28:07 8 No. 2 each item that you used for your comparison and  
 14:28:13 9 conclusion of significant difference.  
 14:28:22 10 A. Well, the recital, very specifically calls  
 14:28:33 11 out that there will be an 80,000 foot Class A type,  
 14:28:36 12 three story building --  
 14:28:40 13 Q. I'm going to stop you right there. Will you  
 14:28:43 14 please find for me in the recitals where it says  
 14:28:47 15 80,000 square foot building?  
 14:28:49 16 MR. WALKER: Objection. Asked and answered.  
 14:28:52 17 THE WITNESS: Well, I'm trying to find it right  
 14:28:53 18 now.  
 14:28:53 19 MR. TROUT: Okay.  
 14:28:56 20 THE WITNESS: I don't know where the recitals  
 14:29:10 21 are. Sorry, gentlemen, if I'm trying your patience.  
 14:29:16 22 I'm doing the best I can, and you will just have to be  
 14:29:39 23 patient with me -- unless you want to help me find the  
 14:29:50 24 recitals. Well, we just had it, and I don't know  
 14:29:54 25 where it is. If you know where it is, help me find

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14:29:55 1 it.  
 14:29:57 2 MR. TROUT: Well, no. This is your deposition,  
 14:29:58 3 Mr. Lemley.  
 14:29:59 4 THE WITNESS: Yes.  
 14:30:02 5 MR. TROUT: And we would like you to handle this  
 14:30:05 6 deposition by yourself, if you would, please.  
 14:30:08 7 THE WITNESS: Well, I will do that if you have no  
 14:30:14 8 concern for the time. All right. I have the recitals  
 14:30:16 9 in front of me.  
 14:30:17 10 MR. TROUT: All right, sir.  
 14:30:23 11 Q. (BY MR. TROUT) And so tell me where in a  
 14:30:29 12 specific quote it says 80,000 square foot building?  
 14:30:34 13 MR. WALKER: Objection. Asked and answered.  
 14:30:38 14 THE WITNESS: Well, let's start with the fact  
 14:30:47 15 that it's going to be a new city hall. The owner  
 14:30:52 16 desires to abate and demolish the existing structures  
 14:30:58 17 on the site and develop a new city hall facility,  
 14:31:08 18 which would connote a building thereon consisting of a  
 14:31:16 19 four-story structure with approximately 80,000 square  
 14:31:21 20 feet of standard Class A office space and related  
 14:31:27 21 improvements with surface parking.  
 14:31:30 22 Now, your question, sir?  
 14:31:32 23 Q. (BY MR. TROUT) Yes, sir. You would agree  
 14:31:36 24 with me, would you not, that it simply does not say  
 14:31:42 25 this is going to be an 80,000 square foot building in

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14:31:45 1 total?  
 14:31:47 2 A. Yes. I would agree with that.  
 14:31:50 3 Q. All right. Now, turning your attention to  
 14:31:55 4 the construction management agreement again, tell me  
 14:32:03 5 the first item in the construction management  
 14:32:08 6 agreement that you rely upon for your conclusion in  
 14:32:16 7 your opinion that the project differs significantly  
 14:32:31 8 from the project described in Petra's contract?  
 14:32:43 9 A. I will rely on paragraph B of the recitals.  
 14:32:57 10 That recital does not say that this building would  
 14:33:05 11 have to accommodate all of the City administration, in  
 14:33:09 12 fact, they could be in the process of developing  
 14:33:20 13 parallel for part of the administration. This says,  
 14:33:25 14 consisting of a four-story structure with  
 14:33:27 15 approximately 80,000 square feet.  
 14:33:31 16 Q. Of office space; correct?  
 14:33:34 17 A. Of standard Class A office space.  
 14:33:39 18 Q. All right. So tell me what other  
 14:33:46 19 description, exclusive of Recital B, that you rely on  
 14:33:51 20 in the construction management agreement for your  
 14:33:56 21 conclusion that the project differs significantly from  
 14:34:01 22 the project described in Petra's contract.  
 14:34:04 23 A. I can't do that now. I'd have to read the  
 14:34:06 24 whole of the agreement again.  
 14:34:11 25 Q. Okay. So as we sit here today, you are

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27 (Pages 272 to 275)



14:34:16	1	unable to do it; is that correct?	14:52:58	1	Q. All right. Turning your attention to the
14:34:20	2	A. I'm able to do it if I re-read the	14:53:03	2	fourth paragraph that commences with the phrase, the
14:34:20	3	agreement.	14:53:08	3	work under COO2, do you see that, sir?
14:34:25	4	Q. Well, then I'm going to ask you to re-read	14:53:08	4	A. I do.
14:34:29	5	the agreement and find those provisions that you think	14:53:14	5	Q. Could you read the first two sentences in
14:34:33	6	describe the project in Petra's contract.	14:53:20	6	that paragraph silently to yourself.
14:34:35	7	A. Okay. I'd be happy to do that.	14:53:20	7	A. Yes.
14:47:04	8	(Brief pause from 2:34 p.m. to 2:47 p.m.)	14:54:36	8	Q. Tell me when you are done, please.
14:47:07	9	THE WITNESS: I pretty well read it. Now, will	14:54:38	9	A. All right. I've read the first two
14:47:13	10	you restate your question? I've forgotten that.	14:54:38	10	sentences.
14:47:14	11	MR. TROUT: Sure.	14:54:44	11	Q. All right. You say in the second sentence,
14:47:22	12	Q. (BY MR. TROUT) Please identify for me	14:54:51	12	"There was no point in the project when Petra or the
14:47:25	13	within the construction management agreement, other	14:54:55	13	City could say that the project described in the
14:47:40	14	than Recital B, each of the items in the description	14:54:57	14	contract was complete."
14:47:46	15	of the project in Petra's contract that you contend	14:54:59	15	Do you see that, sir?
14:47:51	16	changed.	14:55:00	16	A. Yes.
14:48:35	17	A. I think -- well, there was 20,000 square	14:55:04	17	Q. All right. Did I read that correctly?
14:48:43	18	feet of building added under ground, which would have	14:55:04	18	A. Yes.
14:49:02	19	had significant cost connected with it.	14:55:13	19	Q. All right. Would you please again turn to
14:49:10	20	Q. Well, let's make sure we understand. Where	14:55:16	20	the construction management agreement, which is
14:49:16	21	in Exhibit No. 2, the construction management	14:55:21	21	Exhibit No. 2 in front of you.
14:49:26	22	agreement, does it say that one of the stories isn't a	14:55:23	22	A. Yes, sir.
14:49:28	23	basement?	14:55:30	23	Q. And would you show me where in the agreement
14:49:31	24	A. I can't point to anything in the	14:55:40	24	that Petra or the City was required to say that the
14:49:38	25	construction management agreement that says one of the	14:55:48	25	project described in the contract was complete before
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14:49:44	1	stories is a -- is an underground story or basement.	14:55:54	1	Petra would be required to seek the authorization for
14:49:52	2	Q. Okay. And where in the construction	14:56:10	2	extra work.
14:49:58	3	management agreement does it say what the total square	14:58:47	3	A. In my review, I can't see a clause that says
14:50:04	4	footage of the building will be -- that will house	14:58:47	4	that.
14:50:12	5	80,000 square feet of standard Class A office space?	14:58:54	5	Q. All right. Is there some other document
14:50:24	6	A. It does not elaborate on the statements that	14:59:06	6	that you rely upon for your contention that Petra or
14:50:30	7	are contained in paragraph B of the recitals.	14:59:14	7	the City had to say the project described in the
14:50:45	8	Q. All right. So other than paragraph B, point	14:59:23	8	contract was complete before Petra needed to seek
14:50:50	9	out for me what is described in the Petra contract,	14:59:31	9	authorization for the claimed extra work?
14:50:56	10	Exhibit No. 2, that you contend changed.	14:59:35	10	A. I can't point to anything, and I think Petra
14:51:02	11	A. Well, I contend that the -- putting one	14:59:43	11	had an obligation to notify the owner when they became
14:51:07	12	story underground is a change and a significant	14:59:50	12	aware that there was a change to the contract that
14:51:07	13	change.	14:59:54	13	should be covered by a change order.
14:51:12	14	Q. Okay. Other than that contention, which	15:00:16	14	Q. Okay. Let's turn again to page 3 of 12 in
14:51:19	15	isn't stated in the document itself, is there anything	15:00:19	15	your report.
14:51:28	16	stated in the Petra contract that you contend changed,	15:00:19	16	A. I'm there.
14:51:33	17	other than your reference to Recital B?	15:00:26	17	Q. Okay. It says in the very last full
14:51:35	18	A. Not that I can suggest today.	15:00:31	18	paragraph, "The City was consistent in that they did
14:51:44	19	Q. Okay. Let's turn our attention to page 3 of	15:00:36	19	not issue formal change orders to Petra, which would
14:52:20	20	12 of your report, please.	15:00:39	20	clearly authorize added work until the work was
14:52:24	21	A. My report is 91, I guess?	15:00:40	21	complete."
14:52:40	22	Q. Yes, sir. It is.	15:00:42	22	Do you see that, sir?
14:52:44	23	A. Okay. What page do you want me to go to?	15:00:42	23	A. Yes.
14:52:48	24	Q. Three of 12, please.	15:00:47	24	Q. Did I read it correctly?
14:52:48	25	A. Yes, sir.	15:00:47	25	A. Yes, sir.
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15:00:53 1 Q. And you utilized Change Order No. 1 as your  
 15:00:56 2 example; is that correct?  
 15:00:57 3 A. Yes.  
 15:01:03 4 Q. Who prepared Change Order No. 1?  
 15:01:08 5 A. I'm not sure whether Petra did or the City.  
 15:01:14 6 Q. All right. Well, this suggests that you  
 15:01:19 7 knew when you wrote this report that it was prepared  
 15:01:22 8 by the City, doesn't it?  
 15:01:26 9 A. Well, it can be read that way, yes.  
 15:01:32 10 Q. Well, isn't that what you intended, sir?  
 15:01:35 11 A. Yes.  
 15:01:42 12 Q. All right. But would I be correct in  
 15:01:46 13 understanding that before you wrote this report, you  
 15:01:52 14 didn't verify who prepared Change Order No. 1?  
 15:01:54 15 A. That would be a correct assumption.  
 15:02:01 16 Q. All right. And if Petra prepared Change  
 15:02:09 17 Order No. 1, and they were late submitting that to the  
 15:02:13 18 City, that would make a significant difference in this  
 15:02:19 19 aspect of your report, wouldn't it, sir?  
 15:02:20 20 A. Yes, sir. It would.  
 15:02:28 21 Q. And if Petra was late in preparing change  
 15:02:34 22 orders and didn't prepare them until after work was  
 15:02:41 23 already performed by the prime contractors, is it your  
 15:02:45 24 contention as a construction manager that that's good  
 15:02:50 25 practice for a construction manager?

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15:02:58 1 A. I think the good practice for a construction  
 15:03:08 2 manager is to notify their client as soon as they  
 15:03:13 3 become aware of a potential change that there is the  
 15:03:18 4 existence of a potential change. Now, it normally  
 15:03:24 5 takes some time to put the details together to  
 15:03:27 6 finalize a change, and that would have to be approved  
 15:03:31 7 by their client.  
 15:03:38 8 Q. Do you understand, Mr. Lemley, that the A201  
 15:03:41 9 general conditions for the prime contractors on this  
 15:03:46 10 project required that change orders be approved before  
 15:03:54 11 the work was to be performed?  
 15:03:58 12 A. Yes. That was -- that clause is a little  
 15:04:05 13 short sided. There are times when changed work needs  
 15:04:12 14 to be completed before all of the procedural hoops can  
 15:04:18 15 be jumped through because of the need to maintain the  
 15:04:19 16 schedule.  
 15:04:22 17 Q. Well, that really wasn't my question. My  
 15:04:28 18 question, sir, was: You are aware, are you not, that  
 15:04:31 19 Petra's responsibility was to prepare change orders  
 15:04:37 20 and have them approved in advance of work being  
 15:04:41 21 performed on those change orders by the prime  
 15:04:45 22 contractors pursuant to the A201 general conditions;  
 15:04:52 23 correct?  
 15:04:57 24 A. I believe -- I believe I answered that. I  
 15:05:04 25 said that that was the -- procedurally the proper way

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15:05:13 1 to do it, but that there were at times mitigating  
 15:05:17 2 circumstances when changes need to be pushed forward  
 15:05:21 3 in order to maintain a critical item that was  
 15:05:26 4 fundamental to the schedule.  
 15:05:31 5 Q. All right. So tell me which change orders,  
 15:05:38 6 if any, that were prepared late by Petra on this  
 15:05:43 7 project were subject to the mitigating facts that you  
 15:05:45 8 just stated.  
 15:05:46 9 MR. WALKER: Objection. Lack of foundation.  
 15:05:56 10 THE WITNESS: Well, obviously the Change Order 01  
 15:06:04 11 was such a change order. That had to be -- the work  
 15:06:07 12 had to be done with some dispatch in order to allow  
 15:06:13 13 the substructure to the building to move forward and  
 15:06:22 14 subsequently the steel and the frame for the building,  
 15:06:28 15 which were all on critical path positions in the  
 15:06:28 16 schedule.  
 15:06:31 17 Q. (BY MR. TROUT) Tell me what the critical  
 15:06:34 18 path is.  
 15:06:43 19 A. Well, I haven't studied the schedule for  
 15:06:47 20 some time, but it certainly leads through the  
 15:06:50 21 foundation work into the main structure of the  
 15:06:59 22 building, and then the problem of closing the building  
 15:07:06 23 in so that interior work could be done after weather  
 15:07:12 24 turned against the program.  
 15:07:22 25 Q. Okay. So am I correct in assuming that

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15:07:26 1 Lemley International has performed some kind of  
 15:07:28 2 schedule analysis for this project?  
 15:07:33 3 A. I would be amazed if Mr. Bauer hadn't looked  
 15:07:39 4 carefully at the schedule. The schedule is the most  
 15:07:45 5 fundamental element of a construction project to  
 15:07:45 6 understand.  
 15:09:47 7 MR. TROUT: Okay. Let's go off the record for a  
 15:09:47 8 moment.  
 15:09:50 9 MR. WALKER: Can we take a break?  
 15:09:50 10 MR. TROUT: Sure.  
 15:15:19 11 (Recess taken from 3:09 p.m. to 3:15 p.m.)  
 15:15:22 12 MR. TROUT: Back on the record.  
 15:15:51 13 (Deposition Exhibit No. 612 marked.)  
 15:15:56 14 Q. (BY MR. TROUT) Mr. Lemley, I'm going to  
 15:16:01 15 hand you what has been marked as Exhibit No. 612.  
 15:16:05 16 MR. TROUT: And I'm going to apologize, Counsel.  
 15:16:11 17 I haven't made extra copies. I'll make some at the  
 15:16:12 18 break.  
 15:16:12 19 Q. (BY MR. TROUT) Do you recognize the  
 15:16:17 20 handwriting on Exhibit No. 612?  
 15:16:19 21 A. I think it's probably mine.  
 15:16:23 22 Q. All right. And I'm going to represent to  
 15:16:28 23 you that these documents in No. 612 were provided to  
 15:16:35 24 us in electronic format pursuant to the notice of  
 15:16:40 25 deposition duces tecum under which you originally

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15:16:44	1	appeared and under which you had represented to me	15:22:01	1	A. I do.
15:16:49	2	that all of the notes related to this project were	15:22:08	2	Q. Did you verify prior to signing the
15:16:51	3	going to be provided.	15:22:14	3	affidavit and this report that the contaminated soil
15:16:53	4	Do you recall that, sir?	15:22:20	4	work was completed in May of 2007?
15:16:54	5	A. Yes.	15:22:28	5	A. To the extent that Mr. Bauer reviewed and
15:16:59	6	Q. Okay. You'll notice on the face of Exhibit	15:22:32	6	verified that to me, yes, I checked to see.
15:17:02	7	No. 612 --	15:22:40	7	Q. Okay. Now, what does it mean when you say,
15:17:03	8	A. Yes.	15:22:45	8	to the extent that Mr. Bauer reviewed something and
15:17:07	9	Q. -- that there have been portions of this	15:22:46	9	verified it to you?
15:17:15	10	document covered with something in order to preclude	15:22:49	10	A. It means that he has read and studied the
15:17:16	11	our seeing it.	15:22:54	11	issue and represents to me that what is in this
15:17:19	12	Do you recognize that?	15:22:57	12	paragraph is what he found.
15:17:28	13	A. Well, I don't, no. I thought I had	15:23:10	13	Q. Okay. Now, did you review Change Order
15:17:37	14	described earlier today that I had given -- my normal	15:23:13	14	No. 1 prior to preparing your report?
15:17:46	15	activity in my office is to keep a pad on my desk, and	15:23:14	15	A. No.
15:17:56	16	as issues come up, then I generally write notes to	15:23:15	16	Q. Why not?
15:18:17	17	remind myself, and I think when Mr. Bauer sorted these	15:23:21	17	A. I didn't think it was germane to the report.
15:18:33	18	out, he didn't redact everything that wasn't germane	15:23:39	18	Q. Okay. And help me understand why Change
15:18:38	19	to this case.	15:23:46	19	Order No. 1 wasn't germane to the report?
15:18:42	20	Q. So did you instruct Mr. Bauer to redact	15:23:53	20	A. Because it was extra work, and it was -- had
15:18:45	21	these documents?	15:24:03	21	a significant -- significantly different thrust as
15:18:51	22	A. I told him to sort the documents out and	15:24:10	22	opposed to the building itself, which I thought was
15:19:03	23	send you all the documents that had to do with the	15:24:19	23	the primary point of the dispute between the parties,
15:19:10	24	Meridian/Petra matter, and that's what I thought he	15:24:24	24	and that the contaminated soil was clearly recognized
15:19:12	25	had done.	15:24:32	25	as such and disposed of.
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15:19:18	1	Q. Well, did you give him some instruction to	15:24:43	1	Q. Okay. So let's turn to page 6 of 12 for a
15:19:22	2	redact portions of the notes that you made?	15:24:44	2	moment.
15:19:23	3	A. No, I did not.	15:24:53	3	A. Okay. I'm there, sir.
15:19:27	4	Q. So that was Mr. Bauer's decision on his own?	15:25:17	4	Q. Okay. So you say in the middle of the last
15:19:38	5	A. Well, he may have had a -- he's had a reason	15:25:25	5	paragraph, "That the soil removal delayed the framing
15:19:42	6	to do what he did, but I don't know what it is.	15:25:26	6	of the building."
15:19:47	7	Q. All right. But these are your notes, your	15:25:30	7	Do you see that, sir?
15:19:49	8	handwriting; correct?	15:25:32	8	A. Yes, I do see it.
15:19:49	9	A. Yes.	15:25:38	9	Q. Okay. So in order for us to understand what
15:19:59	10	Q. Okay. If I could see the exhibit for just a	15:25:46	10	you did, let me ask you the following questions: Can
15:20:01	11	moment, sir?	15:25:53	11	you tell me what framing you're referring to?
15:20:03	12	A. Oh, sure.	15:25:57	12	A. The steel structure that supports the
15:20:28	13	Q. Thank you.	15:25:57	13	building.
15:20:31	14	MR. TROUT: Let's go off the record for just a	15:26:03	14	Q. All right. And can you tell me who the
15:20:31	15	moment.	15:26:07	15	contractor was for the steel structure?
15:21:24	16	(Off the record.)	15:26:08	16	A. I believe it was Rule Steel.
15:21:26	17	MR. TROUT: Back on the record, please.	15:26:14	17	Q. All right, sir. And what was Rule Steel's
15:21:27	18	Q. (BY MR. TROUT) Turning your attention,	15:26:20	18	contractual start date?
15:21:34	19	again, to page 3 of 12 of your report.	15:26:20	19	A. I don't know.
15:21:34	20	A. Yes, sir.	15:26:27	20	Q. Okay. Prior to your signing your affidavit
15:21:44	21	Q. In the last full paragraph, second sentence,	15:26:34	21	and issuing your report, did you verify what Rule
15:21:50	22	you say, "Change order No. 1 for the management of	15:26:39	22	Steel's contractual start date was?
15:21:54	23	contaminated soil work was issued September 7 even	15:26:39	23	A. No.
15:21:59	24	though the work was completed in May of '07."	15:26:53	24	Q. Okay. With reference to Exhibits 86, 87,
15:22:01	25	Do you see that, sir?	15:26:59	25	and 88, can you tell me today what Rule Steel's start
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15:27:02 1 date was?

15:27:11 2 A. No. I would have to go back and study the

15:27:17 3 schedule and determine it from that.

15:27:23 4 Q. Okay. Would you agree with me, sir, that

15:27:28 5 Petra was responsible for setting the schedule?

15:27:30 6 A. I would agree with that.

15:27:34 7 Q. Okay. Would you agree with me, sir, that

15:27:41 8 Petra was responsible for setting the start dates in

15:27:50 9 the prime contracts in accord with Petra's schedule?

15:27:52 10 A. Yes. With the knowledge that they had at

15:27:54 11 the time they set the schedule.

15:28:19 12 Q. Okay. And if the contaminated soil was

15:28:29 13 completed in May of 2007, Rule Steel's work would not

15:28:33 14 be impaired if they were contractually required to

15:28:39 15 start in June of 2007; correct?

15:28:44 16 A. There is another step in that process, and

15:28:49 17 that's to construct the foundations about which the

15:28:50 18 framing would rest.

15:28:57 19 Q. Okay. And did you verify prior to writing

15:29:02 20 your report when the foundation construction was

15:29:04 21 started.

15:29:04 22 A. I didn't.

15:29:08 23 Q. Okay. Did somebody else?

15:29:09 24 A. Mr. Bauer did.

15:29:12 25 Q. Okay. Tell me when the foundation

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15:29:16 1 construction started?

15:29:20 2 A. Mr. Bauer is not with me. I don't -- I

15:29:22 3 don't -- my memory doesn't have it.

15:29:32 4 Q. Okay. Tell me, based upon what you have

15:29:46 5 written here, how long Rule Steel was delayed from its

15:29:51 6 anticipated start date.

15:29:56 7 A. Well, I guess I'll have to study it a bit.

15:32:52 8 Q. Please do.

15:32:52 9 (Brief pause from 3:29 p.m. to 3:32 p.m.)

15:32:55 10 THE WITNESS: I think I would have to look at the

15:33:01 11 schedule relative to the critical path to determine

15:33:06 12 the potential for lost time.

15:33:37 13 Q. (BY MR. TROUT) Well, that's exactly what

15:33:47 14 Petra would have to have done in the spring of 2007;

15:33:48 15 correct?

15:33:48 16 A. Yes.

15:33:59 17 Q. All right. And what, if anything, did you

15:34:06 18 do to verify whether or not Petra did that?

15:34:11 19 A. I did nothing except instruct Mr. Bauer to

15:34:17 20 be sure that we understood the critical path for the

15:34:25 21 project and that these dates were proper dates.

15:34:31 22 Q. Okay. Which dates are you referring to?

15:34:34 23 A. I'm referring to all of these dates,

15:34:43 24 particularly that influence the completion of the city

15:34:50 25 hall primarily, and the ability to close it in so that

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15:34:54 1 interior work could be carried forward.

15:34:59 2 Q. All right. Is it your contention as Petra's

15:35:05 3 expert that the soil removal was the only delay that

15:35:12 4 affected the mason?

15:35:12 5 A. I don't know.

15:35:24 6 Q. Okay. Is it your contention that the soil

15:35:30 7 removal is the only delay that affected the framing?

15:35:33 8 A. I doubt it.

15:35:37 9 Q. Well, tell me why you doubt that.

15:35:40 10 A. Because there was a lot of building design

15:35:46 11 that was still under way during this period, and the

15:35:53 12 framing would be -- would have to be modified as the

15:35:57 13 design change.

15:36:07 14 Q. Well, did you verify in any fashion whether

15:36:22 15 there were any design changes which modified the frame

15:36:26 16 before you wrote this report?

15:36:32 17 A. Yes, but I don't -- I don't recall the

15:36:35 18 specifics of the subject.

15:36:45 19 Q. Well, tell me what design changes you think

15:36:50 20 you verified prior to writing this report?

15:36:55 21 A. The design changes that I think I verified

15:36:57 22 prior to writing this report?

15:37:01 23 Q. Yes, sir.

15:37:01 24 A. None.

15:37:07 25 Q. Okay. Tell me the design changes that you

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15:37:14 1 had Mr. Bauer verify before you wrote this report.

15:37:18 2 A. I referred him to the schedule, and from the

15:37:28 3 schedule, he was to extract delayed activities or

15:37:33 4 completion dates and track back the reason for those

15:37:45 5 delays. And undoubtedly there was some design issues

15:37:49 6 connected with some of the delays.

15:37:52 7 Q. And do you know what those issues were?

15:37:55 8 A. No. If I did, I'd tell you.

15:38:11 9 Q. All right. So tell me, when did the masons

15:38:15 10 actually begin work on the project?

15:38:19 11 A. I believe in August sometime.

15:38:24 12 Q. All right. And what was their first

15:38:27 13 activity?

15:38:33 14 A. Well, they had to erect scaffolding.

15:38:38 15 Q. All right. And what was the next activity?

15:38:53 16 A. They had to wrap the building.

15:38:56 17 Q. And what does that mean?

15:39:02 18 A. To waterproof the interior of the building

15:39:12 19 so that the grout would -- moisture would not migrate

15:39:18 20 through the sheeting into the main structure of the

15:39:21 21 building and its finishes.

15:39:34 22 Q. I may have asked you this, and I'll

15:39:39 23 apologize if I have. Can you tell me whether anything

15:39:43 24 except contaminated soil affected the mason's

15:39:44 25 schedule?

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31 (Pages 288 to 291)

15:39:45	1	A. I said I don't know.	15:45:31	1	taken to lay that many bricks in the better weather
15:40:20	2	Q. Okay. Can you tell me when the mason was	15:45:40	2	that they would have been able to work in without
15:40:25	3	supposed to begin their work pursuant to Petra's	15:45:45	3	having interference from other contractors and the
15:40:28	4	master schedule to this project?	15:45:54	4	weather and money that they spent to physically warm
15:40:29	5	A. No.	15:45:57	5	their scaffolding to the point that they could, in
15:40:43	6	Q. Turning your attention to page 7 of 12.	15:45:58	6	fact, lay bricks.
15:40:43	7	A. Yes, sir.	15:46:04	7	Q. Okay. And if you were representing the City
15:40:50	8	Q. Can you tell me whether TMC made a written	15:46:12	8	of Meridian in defense of a claim like that, tell me
15:40:54	9	claim for added costs on this project?	15:46:15	9	what you would do to analyze who was responsible for
15:40:55	10	A. I don't believe they did.	15:46:17	10	the delay.
15:41:19	11	Q. Okay. Can you tell me whether or not TMC	15:46:20	11	A. Well, I'd start at the foundation and work
15:41:37	12	actually incurred any added costs for inefficiency?	15:46:20	12	up.
15:41:41	13	A. The fact that they did not turn in a claim	15:46:24	13	Q. Okay. And tell me what your analysis would
15:41:44	14	would suggest that they felt comfortable with the	15:46:30	14	consist of, starting at the foundation and working up?
15:41:48	15	productivity that they had achieved in doing the work.	15:46:37	15	A. This is all a hypothetical --
15:41:54	16	Q. So let me re-ask the question so we can be	15:46:45	16	(Cell phone ringing.)
15:41:55	17	more specific.	15:46:50	17	THE WITNESS: I've got to excuse myself for just
15:41:59	18	Would I therefore be correct in	15:46:52	18	a minute.
15:42:07	19	understanding that based on your review, TMC did not	15:46:53	19	MR. TROUT: We'll go off the record.
15:42:12	20	incur added costs for inefficiency?	15:51:53	20	(Recess taken from 3:46 p.m. to 3:51 p.m.)
15:42:14	21	MR. WALKER: Objection. Lack of foundation.	15:51:56	21	MR. TROUT: Let's go back on the record.
15:42:20	22	THE WITNESS: That is not what I said. I said	15:52:09	22	Q. (BY MR. TROUT) In preparing your report,
15:42:34	23	the fact that TMC did not turn in a claim for the loss	15:52:17	23	can you tell me what documents you relied upon to
15:42:42	24	of productivity would suggest that they felt	15:52:22	24	determine what activities were undertaken by Petra
15:42:46	25	comfortable with the performance that they were able	15:52:28	25	with respect to the administration of the TMC
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15:42:51	1	to achieve.	15:52:30	1	contract?
15:42:51	2	MR. TROUT: All right.	15:52:36	2	A. The information that we were given by the
15:42:57	3	Q. (BY MR. TROUT) So tell me the specific	15:52:45	3	Petra organization and what we -- what documents we
15:43:08	4	things that you contend Petra did in administering the	15:52:53	4	had that we could read and that included a contract
15:43:17	5	TMC contract. What items did Petra actually do?	15:53:16	5	and -- and documents that Mr. Walker and the Petra
15:43:21	6	A. Well, I think the relationship between Petra	15:53:18	6	folks sent us.
15:43:31	7	and TCM [verbatim] was one of trust and that Petra	15:53:20	7	Q. Well --
15:43:43	8	monitored TCM's work carefully and was satisfied that	15:53:28	8	A. I think there is a good record of those we
15:43:52	9	any loss in TCM's productivity might have translated	15:53:32	9	could develop and provide you.
15:44:03	10	into a completion date that wasn't met and that there	15:53:36	10	Q. Well, what I'm asking you to do as Petra's
15:44:08	11	may have been liquidated damages that Petra concluded	15:53:41	11	expert witness is turn your attention to Exhibits 86,
15:44:21	12	were better not enforced as opposed to enforcing a	15:53:47	12	87, and 88 and identify for me the specific documents
15:44:30	13	liquidated damages and then having TCM go to somebody	15:53:53	13	upon which you relied in forming your opinion about
15:44:37	14	like me to build a claim against the Meridian City	15:54:08	14	Petra's work in administering the TMC contract?
15:44:43	15	Hall, which I felt -- and I believe in my last	15:54:11	15	A. Well, I would have to say it wasn't a matter
15:44:49	16	deposition with you I said that had they come to me, I	15:54:16	16	of relying on single documents or single pieces of
15:44:54	17	felt confident I could have developed a very solid	15:54:21	17	paper. It was more a matter of relying on the
15:44:59	18	claim and collected a substantial amount of money, and	15:54:27	18	approach that we saw in the paper and gaining
15:45:01	19	I still feel that way.	15:54:33	19	confidence that Petra, in fact, knew what they were
15:45:05	20	Q. Tell me how much you think you would have	15:54:42	20	doing and were not fighting with the City of Meridian
15:45:06	21	collected.	15:54:49	21	or the architect and that the subcontractors work was
15:45:08	22	A. Maybe a million-and-a-half.	15:54:58	22	going forward in a rational way. That's how we drew
15:45:13	23	Q. Tell me how you make that calculation.	15:55:01	23	these conclusions, not on a single piece of paper.
15:45:22	24	A. It would all relate to TCM's normal	15:55:05	24	Q. Well, I didn't ask you whether you drew it
15:45:26	25	business, the normal length of time it would have	15:55:07	25	on a single piece of paper.
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15:55:10 1 A. Okay. Well, then -- I answered you then.  
 15:55:13 2 Q. I asked what specific documents did you rely  
 15:55:17 3 on in drawing that conclusion?  
 15:55:20 4 A. Those three binders that we brought to you.  
 15:55:24 5 Q. Okay. I'd like you to turn your attention  
 15:55:30 6 to Exhibits 86, 87, and 88, which are the three  
 15:55:34 7 binders, and I'd like to have you identify for me  
 15:55:38 8 which documents within each of those binders you  
 15:55:44 9 relied upon for your opinion stated on page 7 of 12 of  
 15:58:13 10 your report.  
 15:58:20 11 A. 88 --  
 15:58:25 12 Q. When you say, 88, what do you mean, sir?  
 15:58:29 13 A. I mean I see in there that there was a  
 15:58:34 14 normalized communication back and forth until it  
 15:58:47 15 became mired in legal discussion at which time it  
 15:58:54 16 turned into a legal process, I was concerned about the  
 15:59:01 17 construction part of it, not the litigation at that  
 15:59:10 18 time, and we were looking at --  
 15:59:13 19 Q. Well, what specific document in Exhibit  
 15:59:18 20 No. 88, your notebook, are you relying on?  
 15:59:22 21 A. I said I was relying on all of them.  
 15:59:24 22 Q. Every single document?  
 15:59:28 23 A. Yes. In the context of the total problem,  
 15:59:31 24 I'm relying on the general tone of all these  
 15:59:34 25 documents.

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15:59:38 1 Q. Is there any specific document directly  
 15:59:44 2 related to TMC that you rely upon?  
 15:59:51 3 A. I don't have a specific document that I rely  
 16:00:16 4 on relative to any of this, except that there is a --  
 16:00:29 5 a series of communications with contract change  
 16:00:44 6 orders -- it has the mayor's name on it -- and TMC's  
 16:01:19 7 invoices, and a contract change order --  
 16:01:52 8 One of the things that frankly has puzzled  
 16:02:06 9 me enormously is the fact that Petra was given a  
 16:02:13 10 \$12,200,000 dollar budget before they were given any  
 16:02:22 11 designs and instructed that they had to meet that  
 16:02:28 12 budget. And from the beginning of the project, there  
 16:02:43 13 seemed to be no respect for that \$12,200,000 number.  
 16:02:48 14 They seemed to be working themselves more toward a \$20  
 16:02:54 15 million project.  
 16:02:58 16 Q. Well, would you explain to me, sir, how your  
 16:03:04 17 last comment answers my question of what specific  
 16:03:10 18 documents within Exhibit No. 88 you're relying on in  
 16:03:16 19 support of the conclusions stated on page 7 of 12 of  
 16:03:17 20 your opinion?  
 16:03:21 21 A. I told you, sir, that I was relying on all  
 16:03:32 22 of these documents that were being exchanged between  
 16:03:37 23 the various contractors and Meridian approved by the  
 16:03:45 24 architect, and it suggests to me that the work was  
 16:04:04 25 being carried on in an orderly manner until the

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16:04:09 1 attorneys got mixed up into it, and then it turns into  
 16:04:17 2 an adversarial position and carries on that way now.  
 16:04:21 3 There are minutes of meetings. There are  
 16:04:34 4 invoices. There are all sorts of normal activities  
 16:04:43 5 that are carried on, and they are discussed in  
 16:04:49 6 meetings -- stucco samples, dock only; reader board  
 16:04:55 7 location; railroad right-of-way; plaza medallion is a  
 16:05:01 8 go, cost and contract; city clock, awaiting on  
 16:05:11 9 location and size; power to planters, per Christmas  
 16:05:19 10 lights north west corner. That seems to me to be a  
 16:05:25 11 very ordinary and normal type of discussion and the  
 16:05:31 12 way you go through to see that the work gets done in  
 16:05:35 13 an agreeable fashion between the parties.  
 16:05:47 14 So, I can't point to one document. If there  
 16:05:52 15 are, say, 60 in there, I would say that more than half  
 16:06:02 16 are what I relied on in drafting our report.  
 16:06:11 17 The only thing that would change my mind is  
 16:06:21 18 if it's found to be a -- a fraud that was perpetrated  
 16:06:30 19 on Petra. This \$12,200,000 number just flew out of  
 16:06:34 20 the air. Was Meridian government trying to  
 16:06:42 21 misrepresent to their constituents or trying to suck  
 16:06:46 22 in these contractors to a situation where they could  
 16:06:50 23 sue them?  
 16:06:56 24 Q. Is it your contention that the City of  
 16:07:00 25 Meridian committed some kind of fraud?

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16:07:07 1 A. I said I speculated that. I didn't make  
 16:07:08 2 that statement for the record.  
 16:07:11 3 Q. Well, you are on the record right now. Are  
 16:07:15 4 you contending that the City of Meridian was involved  
 16:07:20 5 in some kind of fraud related to Petra?  
 16:07:21 6 A. No.  
 16:07:26 7 Q. Do you have any facts upon which you contend  
 16:07:33 8 that the City of Meridian conducted some kind of  
 16:07:44 9 fraudulent activity related to Petra?  
 16:07:44 10 A. No.  
 16:07:47 11 Q. Are you claiming in some fashion, based on  
 16:07:49 12 your expertise and investigation in this case, that  
 16:07:53 13 the City of Meridian conducted some kind of activity  
 16:08:00 14 that was fraudulent with respect to Petra?  
 16:08:08 15 A. I'm contending that the City of Petra -- the  
 16:08:19 16 City of Meridian created a circumstance where Petra  
 16:08:27 17 was contracted to manage a job without having been  
 16:08:35 18 given all the tools that they needed to oversee and do  
 16:08:42 19 the job, and the fact that -- from my reading, I see  
 16:08:50 20 nothing that suggests that the City of Meridian had  
 16:08:58 21 any concern about the cost of the project after they  
 16:09:02 22 signed the construction management agreement with  
 16:09:12 23 Petra. They -- they may not have perpetrated a fraud,  
 16:09:22 24 but they certainly did not do their duty to their  
 16:09:34 25 constituents in terms of managing this project.

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<p>16:09:38 1 They let the money float out there until it  16:09:44 2 got to \$20 million. Nobody accepted any value  16:09:47 3 engineering. It was a game of gotcha.  16:09:52 4 Q. Well, what does that mean? What does a game  16:09:56 5 of gotcha mean? What professional definition of that  16:10:02 6 do you have based on your experience as a construction  16:10:04 7 management expert?  16:10:14 8 A. Well, it's a situation where you draw  16:10:21 9 somebody into a circumstance to do certain activities  16:10:38 10 that are purported to be one way, and when it starts,  16:10:39 11 suddenly the game changes.  16:10:44 12 Q. Is it your contention as Petra's expert that  16:10:51 13 the City of Meridian and its staff was more  16:10:56 14 experienced in the construction of the Meridian City  16:11:01 15 Hall Project than Petra and its staff?  16:11:05 16 A. No. That's not -- that is not my  16:11:05 17 contention.  16:11:10 18 Q. Is it your contention that Petra is an  16:11:13 19 unsophisticated construction manager?  16:11:14 20 A. That's not my contention either.  16:11:20 21 Q. Is it your contention that Petra expressed  16:11:32 22 to you in the conversations that you had with Petra  16:11:36 23 key personnel that they had been deceived in some way  16:11:38 24 by the City of Meridian?  16:11:42 25 A. Nobody has suggested that to me from Petra</p> <p style="text-align: right;">Page 300</p>	<p>16:13:35 1 modifications of the prime contracts allowed unless  16:13:38 2 they were in writing and signed by the prime  16:13:43 3 contractor and by the City of Meridian?  16:13:49 4 A. Except the City of Meridian could go to the  16:14:00 5 architect and tell the architect to incorporate some  16:14:04 6 new feature into the work, and that would then back  16:14:07 7 down on the construction manager and the general  16:14:08 8 contractors.  16:14:12 9 Q. And the general contractors had a right  16:14:18 10 under their contracts to request appropriately in  16:14:21 11 writing changes in contract time and contract value;  16:14:22 12 correct?  16:14:23 13 A. They did, yes.  16:14:30 14 Q. All right. And if they failed to do that in  16:14:33 15 the appropriate fashion, would you agree with me that  16:14:37 16 it was Petra's responsibility to enforce the terms and  16:14:39 17 conditions of the prime contract for the benefit of  16:14:42 18 the City of Meridian?  16:14:45 19 A. To the extent that they had the authority to  16:14:50 20 do that. They did not, as I said, have the authority  16:15:09 21 to manage the Lombard-Conrad architectural firm. They  16:15:18 22 hadn't been given that power. So the -- the nicest  16:15:24 23 thing I can say about the City of Meridian is that  16:15:28 24 they are incompetent to build a new city hall.  16:15:34 25 Q. Well, that's interesting. Tell me what it</p> <p style="text-align: right;">Page 302</p>
<p>16:11:45 1 or from any other source but --  16:11:46 2 Q. Is it your --  16:11:55 3 A. -- it is my normal way of considering  16:12:06 4 situations where I am being asked to opine that I  16:12:13 5 understand exactly what happened, and I can honestly  16:12:22 6 say in this situation I don't understand what actually  16:12:27 7 happened in the construction of that city hall that  16:12:30 8 drew the cost to \$20 million.  16:12:34 9 Q. All right. That's fair. Let me ask you  16:12:38 10 this question, Mr. Lemley: Is it your contention that  16:12:45 11 Petra had the unilateral right to modify substantial  16:12:49 12 completion dates for prime contractors on this  16:12:50 13 project?  16:12:54 14 A. Not without approval of the owner.  16:12:58 15 Q. All right. And is it your contention that  16:13:07 16 Petra obtained the approval of the City of Meridian in  16:13:11 17 writing for the modification of any substantial  16:13:14 18 completion date for any prime contract on this  16:13:15 19 project?  16:13:19 20 A. I haven't read all the correspondence yet,  16:13:23 21 so I don't know whether that was papered properly or  16:13:24 22 not.  16:13:25 23 Q. Do you understand --  16:13:27 24 A. But I am going to find out.  16:13:31 25 Q. Do you understand, sir, that there were no</p> <p style="text-align: right;">Page 301</p>	<p>16:15:40 1 is in the documentation that you have read that  16:15:45 2 provides the foundation for your analysis of the  16:15:57 3 competence of the City of Meridian personnel?  16:15:59 4 A. In the first instance, they set the  16:16:07 5 organization up wrong. In the second instance, when  16:16:14 6 they did hire what was a competent architect and a  16:16:21 7 competent construction manager, they didn't marry them  16:16:25 8 together with an assignment of the architect's  16:16:37 9 contract to Petra or vice versa.  16:16:42 10 Q. Okay. So where would I find authoritative  16:16:45 11 literature in the construction industry that would in  16:16:48 12 your view support your contention that the City of  16:16:55 13 Meridian had to assign its contract with LCA to Petra  16:17:02 14 in order to appropriately structure this transaction?  16:17:07 15 A. That's an over simplification of my  16:17:17 16 position. The element of this that makes it  16:17:28 17 unworkable from a primary standpoint is the fact that  16:17:34 18 the City of Meridian didn't have on staff people that  16:17:42 19 were adequately experienced to represent them in the  16:17:49 20 management of all these contracts and Petra had only  16:17:53 21 so much authority. There had to be somebody that  16:17:58 22 could reconcile the design with the construction  16:17:58 23 problems.  16:18:02 24 Q. Well, that would seem to be something that  16:18:11 25 an experienced construction manager like Petra could</p> <p style="text-align: right;">Page 303</p>

16:18:14 1 immediately recognize, wouldn't you agree?  
 16:18:14 2 A. I would agree.  
 16:18:30 3 Q. Okay. And you said just a few minutes ago  
 16:18:40 4 that there was nothing that gave Petra the authority  
 16:18:43 5 to manage the architect; is that correct?  
 16:18:53 6 A. I said that to have properly expected Petra  
 16:18:58 7 to manage the architect, there should have been an  
 16:19:03 8 assignment from the City to Petra that gave them a  
 16:19:09 9 legal authority to manage the work of the architect.  
 16:19:14 10 Q. Okay. So if I turn your attention to page 1  
 16:19:24 11 of 12 of your report --  
 16:19:54 12 A. Yes. All right. I'm there.  
 16:19:57 13 Q. -- and I ask you to direct your attention to  
 16:20:06 14 the fifth full paragraph where you quote the Petra  
 16:20:09 15 contract. Read that silently to yourself and signify  
 16:20:42 16 for me when you are done.  
 16:20:43 17 A. I'm done.  
 16:20:47 18 Q. All right, sir. Is it your contention as  
 16:20:52 19 Petra's expert witness that the language from the  
 16:20:59 20 contract that says, "Petra is to do all things or when  
 16:21:04 21 appropriate require the architect to do all things  
 16:21:10 22 necessary, appropriate, or convenient to achieve the  
 16:21:16 23 end result desired by the owner," that that language  
 16:21:19 24 doesn't give Petra the authority to manage the  
 16:21:23 25 architect on behalf of the City of Meridian?

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16:21:24 1 MR. WALKER: Objection. Asked and answered.  
 16:21:31 2 THE WITNESS: There is a -- an issue here, and  
 16:21:46 3 that's -- there is nothing in here about the City's  
 16:21:50 4 direct management of the architect, and the  
 16:21:56 5 instructions that the architect gets -- does the  
 16:22:01 6 contractor get the instructions simultaneously so they  
 16:22:05 7 can be aware of what is appropriate and convenient to  
 16:22:10 8 achieve the end results desired by the owner, included  
 16:22:17 9 but not limited to those tasks set forth in Article 4.  
 16:22:21 10 Q. (BY MR. TROUT) Sir, I'm going to ask you my  
 16:22:23 11 question one more time.  
 16:22:26 12 A. And I'll answer it one more time, and then  
 16:22:27 13 I'm going home.  
 16:22:33 14 Q. Is it your contention that the language that  
 16:22:43 15 we just read in paragraph 5 on page 1 of 12 does not  
 16:22:48 16 grant Petra the authority to manage the architect for  
 16:22:50 17 this project?  
 16:22:51 18 A. It's --  
 16:22:54 19 MR. WALKER: Objection. Asked and answered.  
 16:23:04 20 THE WITNESS: It's ambiguous.  
 16:23:04 21 MR. TROUT: All right.  
 16:23:08 22 Q. (BY MR. TROUT) Well, tell me, sir, what  
 16:23:11 23 language would you have recommended based on your  
 16:23:20 24 professional experience to allow the City to authorize  
 16:23:40 25 Petra to manage and coordinate the design for this

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16:23:41 1 project?  
 16:23:44 2 A. I would have assigned the architect's  
 16:23:59 3 contract to the construction manager along with a  
 16:24:01 4 close communication as to what the City actually  
 16:24:07 5 required and let the construction manager manage the  
 16:24:11 6 architect rather than have somebody wandering through  
 16:24:16 7 the architect's office every week or so to give them a  
 16:24:17 8 new instruction.  
 16:24:21 9 Q. And who was it from the City of Meridian  
 16:24:24 10 that you think was wandering through the architect's  
 16:24:28 11 office every week or so to give them a new  
 16:24:29 12 instruction?  
 16:24:31 13 A. In the first instance, probably the  
 16:24:35 14 purchasing manager, but I don't think it would be  
 16:24:40 15 confined to one person. I think it would be virtually  
 16:24:43 16 anybody who this morning had an interest in something  
 16:24:46 17 that went to the architect's office.  
 16:24:48 18 Q. Is it your contention that that's exactly  
 16:24:50 19 what happened in this case?  
 16:24:53 20 A. I didn't say exactly. That's your word.  
 16:24:58 21 Q. No. Is it your contention that those facts  
 16:25:01 22 occurred in this case?  
 16:25:07 23 A. It's my contention that it's likely that  
 16:25:11 24 that's the way the architect's contract was  
 16:25:17 25 administered outside of what Petra -- what

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16:25:19 1 administration Petra gave them.  
 16:25:22 2 Q. Well, what administration did Petra provide  
 16:25:24 3 for the architect?  
 16:25:27 4 MR. WALKER: Objection. Asked and answered.  
 16:25:33 5 THE WITNESS: I think in the last day-and-a-half  
 16:25:39 6 I've answered that question, and I think that answer  
 16:25:43 7 should suffice.  
 16:25:44 8 MR. TROUT: Well, I understand Counsel's  
 16:25:47 9 objection, but you are under an obligation to answer  
 16:25:51 10 the question, even if you have to answer it again,  
 16:25:51 11 sir.  
 16:25:54 12 Q. (BY MR. TROUT) So please tell me what  
 16:25:59 13 administration do you contend that Petra exerted in  
 16:26:03 14 its performance of its contract with respect to  
 16:26:05 15 Lombard-Conrad?  
 16:26:07 16 MR. WALKER: Objection. Asked and answered.  
 16:26:11 17 THE WITNESS: It had weekly meetings with the  
 16:26:17 18 architect, and they provided the architect, the  
 16:26:21 19 general contractor's billings, and the architect had  
 16:26:27 20 to approve those, so that was a regularized contact.  
 16:26:29 21 Q. (BY MR. TROUT) Is it your contention that  
 16:26:34 22 LCA approved every Petra billing?  
 16:26:36 23 A. It is my contention that they approved the  
 16:26:38 24 bulk of them, yes.  
 16:26:41 25 Q. No my question was: Is it your contention

Page 307

35 (Pages 304 to 307)



16:26:46 1 that LCA approved every Petra billing?  
16:26:46 2 A. No.  
16:26:59 3 MR. TROUT: Okay. We are going to adjourn for  
16:27:03 4 the day. We will coordinate with Mr. Walker for an  
16:27:05 5 appropriate time to complete this deposition.  
16:27:10 6 Mr. Walker, I'm going to ask that you  
16:27:16 7 provide us with the unredacted copies of documents  
16:27:20 8 from Mr. Lemley's files.  
16:27:25 9 THE WITNESS: Those files are certainly open for  
16:27:30 10 your review on anything that relates to the  
16:27:35 11 Petra/Meridian situation, but there are certain notes  
16:27:40 12 on there that relate to other projects I'm doing --  
16:27:42 13 MR. TROUT: Well --  
16:27:46 14 THE WITNESS: -- and those will be redacted.  
16:27:50 15 MR. TROUT: With all due respect, kind sir, you  
16:27:54 16 have the right to preserve confidentiality, but we  
16:27:58 17 will ask that the unredacted files be cumulated into  
16:28:03 18 some privileged log, and we will ask the Court to  
16:28:05 19 determine whether or not what has been redacted  
16:28:11 20 relates to this project or not without deference to  
16:28:13 21 the judgment of your staff.  
16:28:14 22 THE WITNESS: That's fine with me.  
16:28:16 23 MR. TROUT: Good. That's good.  
16:28:21 24 Thank you, Mr. Lemley. You have a good day.  
16:28:24 25 THE WITNESS: What's left of it will be good,

Page 308

16:28:25 1 yes. Good day.  
16:28:25 2  
16:28:25 3 (The deposition concluded at 4:28 p.m.)  
16:28:25 4 (Signature requested.)  
16:28:25 5  
16:28:25 6  
16:28:25 7  
16:28:25 8  
16:28:25 9  
16:28:25 10  
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16:28:25 20  
16:28:25 21  
16:28:25 22  
16:28:25 23  
16:28:25 24  
16:28:25 25

Page 309

1 VERIFICATION  
2  
3 STATE OF \_\_\_\_\_ )  
4 ) ss.  
5 COUNTY OF \_\_\_\_\_ )  
6  
7 I, JACK K. LEMLEY, being first duly sworn on  
8 my oath, depose and say:  
9 That I am the witness named in the foregoing  
10 deposition taken on the 22nd day of July, 2010,  
11 consisting of pages numbered 168 to 311, inclusive;  
12 that I have read the said deposition and know the  
13 contents thereof; that the questions contained  
14 therein were propounded to me; that the answers to  
15 said questions were given by me; and that the answers  
16 as contained therein (or as corrected by me therein)  
are true and correct.


Corrections Made: Yes \_\_\_\_\_ No \_\_\_\_\_

JACK K. LEMLEY

Subscribed and sworn to before me this \_\_\_\_\_  
day of \_\_\_\_\_, 2010, at \_\_\_\_\_, Idaho.

Notary Public for Idaho  
Residing at \_\_\_\_\_, Idaho.  
My Commission Expires: \_\_\_\_\_

Page 310

1 REPORTER'S CERTIFICATE  
2 STATE OF IDAHO )  
3 ) ss.  
4 COUNTY OF ADA )  
5  
6 I, JANET FRENCH, Certified Shorthand Reporter and  
7 Notary Public in and for the State of Idaho, do hereby  
8 certify:  
9 That prior to being examined, the witness named  
10 in the foregoing deposition was by me duly sworn to  
11 testify to the truth, the whole truth, and nothing but  
12 the truth;  
13 That said deposition was taken down by me in  
14 shorthand at the time and place therein named and  
15 thereafter reduced to typewriting under my direction,  
16 and that the foregoing transcript contains a full,  
17 true and verbatim record of said deposition.  
18 I further certify that I have no interest in the  
19 event of this action.  
20 WITNESS my hand and seal this \_\_\_\_\_ day of  
21 \_\_\_\_\_, 2010.  
22  Janet French  
23 JANET FRENCH,  
CSR, RPR and Notary  
24 Public in and for the  
State of Idaho.  
25 My Commission Expires: 10-28-2010

Page 311

36 (Pages 308 to 311)

NO. \_\_\_\_\_  
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**SEP 13 2010**

**J. DAVID NAVARRO, Clerk**  
**By KATHY BIEHL**  
**DEPUTY**

**KIM J. TROUT, ISB #2468**  
**DANIEL LORAS GLYNN, ISB #5113**  
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Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**AMENDED NOTICE OF HEARING RE:  
PLAINTIFF CITY OF MERIDIAN'S  
MOTION TO DISMISS (IDAHO TORT  
CLAIMS ACT)**

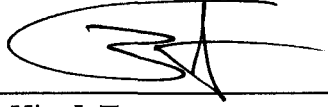
**TO: THE ABOVE NAMED DEFENDANT AND ITS COUNSEL OF RECORD:**

PLEASE TAKE NOTICE, that the hearing on Plaintiff's Motion to Dismiss which is currently scheduled to be heard on Wednesday September 15, 2010 at the hour of 3:30p.m. is hereby vacated pursuant to the agreement between Court and Counsel, and will be heard on **Thursday September 16, 2-010 at the hour of 3:00 p.m. before the Honorable Ronald J. Wilper.** The hearing is scheduled at the Ada County Courthouse located at 200 W. Front St., Boise, ID, 83702.

 **AMENDED NOTICE OF HEARING RE: PLAINTIFF CITY OF MERIDIAN'S  
MOTION TO DISMISS (IDAHO TORT CLAIMS ACT)**

DATED this 13<sup>th</sup> day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.

By:   
Kim J. Trout  
Attorneys for Plaintiff

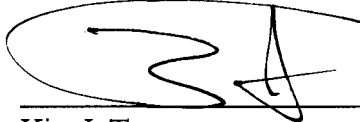
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13<sup>th</sup> day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
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Kim J. Trout

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A.M. \_\_\_\_\_ FILED P.M. 4:11

SEP 13 2010

J. DAVID NAVARRO, Clerk  
By KATHY BIEHL  
DEPUTY

**KIM J. TROUT, ISB #2468**

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**PLAINTIFF'S MOTION IN LIMINE RE:  
EXPERT TESTIMONY OF JACK K.  
LEMLEY**

COMES NOW the City of Meridian (hereinafter referred to as "the City"), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., and hereby moves this Court pursuant to Rules 7(b) and 26(e) of the Idaho Rules of Civil Procedure, for an order in limine to exclude testimony and documents of Jack K. Lemley.

This motion is based on the pleadings, records and files in this case and the Plaintiff's Memorandum in Support of its Motion in Limine Re: Expert Testimony of Jack K. Lemley and the Affidavit of Kim J. Trout dated September 13, 2010.

Oral argument is requests on this motion and is currently scheduled for September 27, 2010 at 1:30 p.m.

DATED this 13<sup>th</sup> day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
Gourley, P.A.

By: \_\_\_\_\_

Kim J. Trout  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

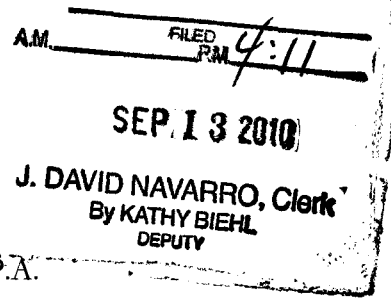
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\_\_\_\_\_  
Kim J. Trout



**KIM J. TROUT, ISB #2468**

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Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**PLAINTIFF'S MEMORANDUM IN  
SUPPORT OF MOTION IN LIMINE RE:  
EXPERT TESTIMONY OF JACK K.  
LEMLEY**

The Plaintiff City of Meridian (hereinafter referred to as the "City"), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., submits this Memorandum in Support of its Motion in Limine re: Expert Testimony of Jack K. Lemley.

As part of the evidentiary record in this matter on the pending motions for summary judgment, the Defendant Petra Incorporated (hereinafter referred to as "Petra") submitted the Affidavit of Jack K. Lemley dated April 30, 2010. Putting aside the lack of a timely, advance disclosure of Mr. Lemley as an expert witness, the truly troubling aspect of Mr. Lemley's Affidavit is that it appears not to be the expert testimony of Mr. Lemley, but rather the expert testimony of the combined corporate entity that is Lemley International. There is no authority under the rules for a consulting firm to assimilate the efforts of its various employees into a combined opinion of one

representative, in this case Mr. Lemley. For this reason, the City should be entitled to an order in limine prohibiting Mr. Lemley from acting as the conduit of the assimilated, collective opinions of Lemley International.

### **ARGUMENT**

A review of the Affidavit of Jack K. Lemley dated April 30, 2010 reveals that a substantial portion of the foundation for his purported expert opinions, as well as the expert opinions themselves, are derived not from his own independent analysis but rather those of the employees of his company, Lemley International. For example, Mr. Lemley admits that his opinions were assisted in the formulation by “various [unnamed] employees of Lemley International as well as his own, self-qualified “expert in the field of construction, construction management, and engineering” Richard K. Bauer. (Lemley Aff., ¶ 4-6.) As Mr. Lemley states, “all of the opinions contained herein are based upon interviews conducted by me and Mr. Bauer and upon our review of the pertinent documents, which we have discussed in detail.” (Lemley Aff., ¶ 7.) (Emphasis added.) The Lemley Affidavit then proceeds to detail the various individuals, documents, and sites that either Mr. Lemley or Mr. Bauer, or others, interview, reviewed, or viewed, without any identification as to which one undertook which action.

Thus, in reviewing the foundation for Mr. Lemley’s expert opinions, the City is left completely in the dark about who undertook which action in the preparation of Mr. Lemley’s ultimate opinion that “... Petra exercised ordinary and reasonable care ...” (Lemley Aff., ¶ 15.) Thus Mr. Lemley’s expert opinion is admittedly, to some degree, in reliance upon the interviews of various individuals conducted by others as well as other individuals review of documents and sites. The City is left without any disclosure as to whether, for example, Mr. Lemley is relying upon an interview he conducted, a transcript of an interview that was conducted by Mr. Bauer or Mr. Bauer’s account of an interview he conducted. Additionally, as Mr. Lemley’s Affidavit discloses that his

opinions are generated as a result of his collaboration with Mr. Bauer, the City is unable to discern which opinions are Mr. Lemley's and which are those of Mr. Bauer.<sup>1</sup>

In fact, given the attempted qualification of Mr. Bauer by Mr. Lemley within his affidavit, it is not only a question of what information served as the foundation for the opinions to be expressed, but whether in fact Mr. Lemley is the one presenting the expert testimony in this matter. At its most basic, it is apparent that Petra is seeking to disclose Lemley International, not Mr. Lemley, as the expert witness in this matter. However, there is absolutely no authority which would permit a witness to provide expert testimony as the designee for an entity. To allow Mr. Lemley to be qualified as an expert witness in this matter would essentially be to permit Mr. Lemley to offer the combined expert opinions of both himself and Mr. Bauer. While the Idaho Rules of Evidence provide some latitude to the qualification and disclosure of an expert witness, that latitude does not extend so far as to make the rules of evidence disappear entirely in the preparation and presentation of expert testimony as would be the case if Mr. Lemley were to testify as an expert witness in this matter.

Mr. Lemley's expert opinion is not based upon his own analysis, or the expression of his own opinion, but rather represents the collective assembly, review and development of at least one identified, and numerous other unidentified, individuals at Lemley International. The disclosure of Mr. Lemley's opinion wholly fails to comply with any aspect of I.R.E. 703 and should not be permitted to be presented at the trial of this matter.

---

<sup>1</sup> While not yet complete, the deposition of Mr. Lemley has revealed numerous instances where Mr. Lemley was unable to provide the basis and foundation for various expressions of fact and opinion without needing further reference to, and consultation with, Mr. Bauer. (See Affidavit of Kim J. Trout dated September 13, 2010, Exhibits "A" & "B".)



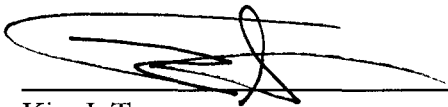
## CONCLUSION

For the reasons stated, the City requests that this Court grant its Motion in Limine re: Expert Testimony of Jack K. Lemley.

DATED this 13<sup>th</sup> day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
Gourley, P.A.

By: \_\_\_\_\_

  
Kim J. Trout  
Attorneys for Plaintiff

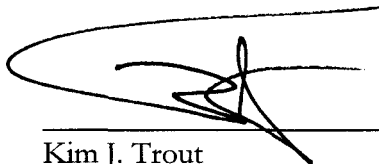
## CERTIFICATE OF SERVICE

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\_\_\_\_\_  
Kim J. Trout

**KIM J. TROUT, ISB #2468**

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Facsimile: (208) 331-1529

Attorneys for Plaintiff

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_  
FILED P.M. 4:11

**SEP. 13 2010**

**J. DAVID NAVARRO, Clerk**  
By **KATHY BIEHL**  
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**MOTION IN LIMINE RE: EXPERT  
TESTIMONY OF BENNETT,  
COUGHLIN, AND FRANK**

COMES NOW the City of Meridian (hereinafter referred to as "the City"), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., and hereby moves this Court pursuant to Rules 7(b) and 26(e) of the Idaho Rules of Civil Procedure, for an order in limine to exclude testimony and documents of Jack K. Lemley.

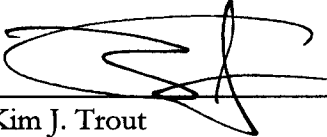
This motion is based on the pleadings, records and files in this case and the Plaintiff's Memorandum in Support of its Motion in Limine Re: Expert Testimony of Jack K. Lemley and the Affidavit of Kim J. Trout dated September 13, 2010.

Oral argument is requests on this motion and is currently scheduled for September 27, 2010 at 1:30 p.m.

DATED this 13<sup>th</sup> day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
Gourley, P.A.

By: \_\_\_\_\_

  
Kim J. Trout  
Attorneys for Plaintiff


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13<sup>th</sup> day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
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Boise, Idaho 83707-9518  
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Kim J. Trout

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SEP 13 2010

J. DAVID NAVARRO, Clerk  
By KATHY BIEHL  
DEPUTY

**KIM J. TROUT, ISB #2468**

**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.**

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Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**PLAINTIFF'S MEMORANDUM IN  
SUPPORT OF MOTION IN LIMINE RE:  
EXPERT TESTIMONY OF BENNETT,  
COUGHLIN, AND FRANK**

The Plaintiff City of Meridian (hereinafter referred to as "the City"), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., submits this Memorandum in Support of its Motion in Limine re: Expert Testimony of Bennett, Coughlin and Frank.

As part of the evidentiary record in this matter on the pending motions for summary judgment, the Defendant Petra Incorporated (hereinafter referred to as "Petra") submitted Affidavits from Eugene Bennett, Thomas Coughlin, and Jerald Frank, which, among other statements, contained the expressions of expert opinion as to certain key matters in this case. However, it is undisputed, and apparently conceded by Petra, that none of these individuals were ever disclosed as expert witnesses. As such, the City is entitled to an order in limine prohibiting

Messrs. Bennett, Coughlin, and Frank from presenting any expert testimony at the trial of this matter.

### ARGUMENT

As noted by the City in its Motion to Strike the Affidavits of Bennett, Coughlin and Frank submitted in support of Petra's Motion for Summary Judgment, Interrogatory No. 16 of the City's First Set of Interrogatories, Requests for Production of Documents and Requests for Admissions required that Petra disclose "each and every person Petra expects to call as an expert witness at any hearing or at trial" along with all the information required by I.R.C.P. 26(b)(4). *See Trout Affidavit in Support of Plaintiff's Rule 56(f) Motion*, ¶¶ 3-5 and Ex. A. Petra has never disclosed Messrs. Bennett, Coughlin, and Frank as expert witnesses in this matter. *Trout Affidavit in Support of Plaintiff's Rule 56(f) Motion*, ¶ 6. In fact, Petra has apparently conceded that Messrs. Bennett, Coughlin, and Frank will not be providing expert testimony at the trial in this matter. *See Petra's Memorandum in Opposition to Plaintiff's Motion to Strike the Affidavits of Bennett, Coughlin, Frank, and Lee*, page 3.

Taking Petra's representation at its face value, the City nonetheless believes that an order in limine prohibiting any potential expert testimony given by these individuals at trial is nonetheless required. A review of the Affidavits of these individuals reveals that on numerous occasions, these individuals proceeded to provide more than just factual testimony, but additionally opined as to all manner of subjects exclusively within the purview of expert testimony. For example, Mr. Bennett proffers expert testimony on subjects such as, but not limited to, whether or not Petra performed its work as construction manager in accordance with the applicable standard of care and offers opinions about soil contamination and containment issues. (Affidavit of Eugene Bennett dated August 5, 2010 In Support of Petra's Motion for Summary Judgment, ¶ 10, and 71-73.) Mr. Coughlin likewise opines that Petra "performed its work as Construction Manager in accordance with this standard of care." (Affidavit of Thomas R. Coughlin dated May 5, 2010, ¶ 7.) Finally, Mr.

Frank also provides an expert opinion that “[a]t all times during the course of this project, Petra performed its work in accordance with the applicable standard of care for construction managers.” (Affidavit of Jerald S. Frank dated May 4, 2010 in Support of Petra Incorporated’s Motion for Summary Judgment, ¶ 8.)


All of these opinions are expert opinions which should not be considered in the course of the summary judgment proceedings and, given their lack of disclosure as expert witnesses, should not be presented in the course of the trial of this matter. Accordingly, an order prohibiting Messrs. Bennett, Coughlin, and Frank from providing expert opinions at the trial of this matter should be entered.

### CONCLUSION

For the reasons stated, the City requests that this Court grant its Motion in Limine re: Expert Testimony of Bennett, Coughlin, and Frank.

DATED this 18<sup>th</sup> day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
Gourley, P.A.

By:   
\_\_\_\_\_  
Kim J. Trout  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15<sup>th</sup> day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

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\_\_\_\_\_  
Kim J. Trout

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SEP 14 2010

J. DAVID NAVARRO, Clerk  
BY L. AMES  
DEPUTY

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Erika K. Klein (ISB No. 5509)  
Mackenzie Whatcott (ISB No. 6774)  
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Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com); [mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**NOTICE OF TAKING CONTINUED  
AUDIO-VIDEO DEPOSITION OF TED  
BAIRD**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated,  
by and through its counsel of record, Thomas G. Walker, will take the continued testimony, upon  
oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure,



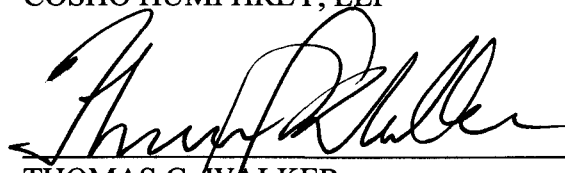
of **Ted Baird**, on **Tuesday the 5th day of October, 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010.

COSHO HUMPHREY, LLP

A handwritten signature in black ink, appearing to read 'Thomas G. Walker', is written over a horizontal line.

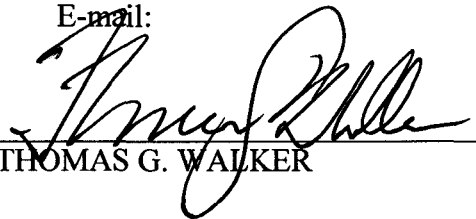
THOMAS G. WALKER  
Attorney for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14<sup>th</sup> day of September, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☐ Facsimile:  
☐ E-mail:

  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED PM 3:21  
**SEP 14 2010**  
J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB No. 5509)  
Mackenzie Whatcott (ISB No. 6774)  
COSH O HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com); [mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**NOTICE OF TAKING CONTINUED  
AUDIO-VIDEO DEPOSITION *DUCES*  
*TECUM* OF STEVEN J. AMENTO**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated  
("Petra"), by and through its counsel of record, Thomas G. Walker, will take the continued  
testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of

NOTICE OF TAKING CONTINUED AUDIO VIDEO DEPOSITION *DUCES TECUM*  
OF STEVEN J. AMENTO  
618587

Page 1  
006300

Civil Procedure, of Steven J. Amento, on Wednesday the 6th day of October, 2010, beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents<sup>1</sup> provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;<sup>2</sup>
2. All documents utilized by you in the rendering of your opinion in this matter;
3. Your personal notes, including in electronic and all other forms, regarding this matter;

---

<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

<sup>2</sup> "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.

4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;<sup>3</sup>

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars<sup>4</sup> appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;<sup>5</sup>

9. All communications<sup>6</sup> between you and any employee, consultant or agent of you and any person related to this matter<sup>7</sup>;

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

12. All photographs related to this matter;

13. All billing records related to this matter;

---

<sup>3</sup> The terms "employee, consultant and agent" reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

<sup>4</sup> Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

<sup>5</sup> This request is specific for the calendar appointments related to this matter.

<sup>6</sup> "Communications" mean any and all written or oral communications, including but not limited to inter- or -intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

<sup>7</sup> "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;

15. Copies of all drafts of your July 2, 2010 affidavit;

16. All agreements entered into between the City of Meridian and you related to this matter; and

17. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010.

COSHO HUMPHREY, LLP



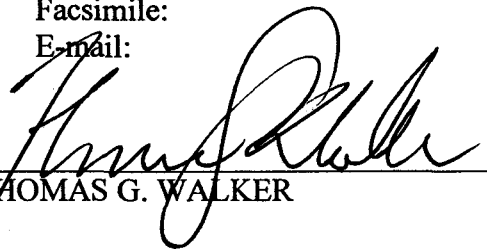
THOMAS G. WALKER  
Attorney for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14<sup>th</sup> day of September, 2010, a true and correct copy of  
the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☐ Facsimile:  
☐ E-mail:

  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_ FILED 9:34  
A.M. \_\_\_\_\_ P.M.

SEP 14 2010

J. DAVID NAVARRO, Clerk  
By L. AMES  
REPLY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB No. 5509)  
Mackenzie Whatcott (ISB No. 6774)  
COSH O HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com); [mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**NOTICE OF TAKING THE  
CONTINUED AUDIO-VIDEO  
DEPOSITION *DUCES TECUM* OF  
TODD WELTNER**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated  
("Petra"), by and through its counsel of record, Thomas G. Walker, will take the continued  
testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of

NOTICE OF TAKING THE CONTINUED AUDIO VIDEO DEPOSITION *DUCES TECUM* OF  
TODD WELTNER  
618574

Page 1  
006305



Civil Procedure, of **Todd Weltner**, on **Thursday the 7th day of October, 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents<sup>1</sup> provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;<sup>2</sup>
2. All documents utilized by you in the rendering of your opinion in this matter;
3. Your personal notes, including in electronic and all other forms, regarding this matter;
4. Personal notes, including in electronic and all other forms, of any employee,

---

<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

<sup>2</sup> "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.

consultant or agent assisting you in this matter;<sup>3</sup>

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars<sup>4</sup> appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;<sup>5</sup>

9. All communications<sup>6</sup> between you and any employee, consultant or agent of you and any person related to this matter<sup>7</sup>;

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

12. All photographs related to this matter;

13. All billing records related to this matter;

---

<sup>3</sup> The terms "employee, consultant and agent" reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

<sup>4</sup> Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

<sup>5</sup> This request is specific for the calendar appointments related to this matter.

<sup>6</sup> "Communications" mean any and all written or oral communications, including but not limited to inter- or -intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

<sup>7</sup> "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;

15. Copies of all drafts of your May 24, 2010 affidavit and your Second Affidavit dated July 6, 2010;

16. All agreements entered into between the City of Meridian and you related to this matter; and

17. All agreements entered into between you and Trout Jones related to this matter.


This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010.

COSHO HUMPHREY, LLP

  
\_\_\_\_\_  
THOMAS G. WALKER  
Attorney for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14<sup>th</sup> day of September, 2010, a true and correct copy of the within and foregoing Third Amended Notice of Taking Audio Video Deposition Duces Tecum was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☐ Facsimile:  
☐ E-mail:

  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_ FILED 334  
A.M. \_\_\_\_\_ P.M.

SEP 14 2010

J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**NOTICE OF TAKING AUDIO-VIDEO  
DEPOSITION *DUCES TECUM* OF TIM  
PETSCH**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of **Tim Petsche**, on **Friday the 8th day of October 2010**, beginning at the hour of **10:30 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents<sup>1</sup> provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;<sup>2</sup>
2. All documents utilized by you in the rendering of your opinion in this matter;

---

<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

<sup>2</sup> "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.

3. Your personal notes, including in electronic and all other forms, regarding this matter;
4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;<sup>3</sup>
5. Your work notes, including in electronic and any other form, regarding this matter;
6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;
7. Meeting notes regarding this matter;
8. Calendars<sup>4</sup> appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;<sup>5</sup>
9. All communications<sup>6</sup> between you and any employee, consultant or agent of you and any person related to this matter<sup>7</sup>;
10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.
11. All recordings, either voice or video, related to this matter.

---

<sup>3</sup> The terms "employee, consultant and agent" reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

<sup>4</sup> Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

<sup>5</sup> This request is specific for the calendar appointments related to this matter.

<sup>6</sup> "Communications" mean any and all written or oral communications, including but not limited to inter- or -intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

<sup>7</sup> "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

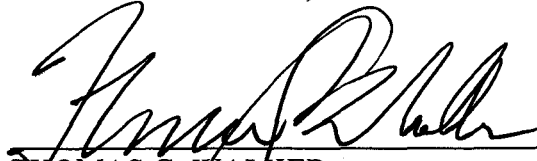
12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010.

COSHO HUMPHREY, LLP

  
\_\_\_\_\_  
THOMAS G. WALKER  
Attorney for Petra Incorporated

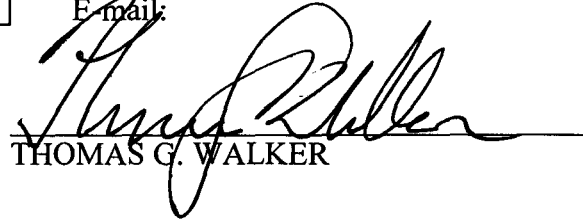


### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14<sup>th</sup> day of September, 2010, a true and correct copy of the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Overnight Courier
- ☐ Facsimile:
- ☐ E-mail:

  
THOMAS G. WALKER

**SEP 14 2010**

**J. DAVID NAVARRO, Clerk**  
**By L. AMES**  
**DEPUTY**

**ORIGINAL**

**Thomas G. Walker (ISB No. 1856)**  
**Erika K. Klein (ISB 5509)**  
**Mackenzie Whatcott (ISB No. 6774)**  
**Matthew B. Schelstrate (ISB No. 8276)**  
**COSHO HUMPHREY, LLP**  
**800 Park Blvd., Suite 790**  
**P. O. Box 9518**  
**Boise, Idaho 83707-9518**  
**Direct Phone: (208) 639-5607**  
**Cell Phone: (208) 869-1508**  
**Direct Facsimile: (208) 639-5609**  
**E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);**  
**[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)**

**Attorneys for Defendant/Counterclaimant, Petra Incorporated**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF**

**THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**★ ★ ★ ★ ★**

**THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,**

**Plaintiff/Counterdefendant,**

**vs.**

**PETRA INCORPORATED, an Idaho corporation,**

**Defendant/Counterclaimant.**

**Case No. CV OC 0907257**

**NOTICE OF TAKING AUDIO-VIDEO  
DEPOSITION *DUCES TECUM* OF NEIL  
ANDERSON**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

*CA*

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of **Neil Anderson**, on **Monday the 25th day of October 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents<sup>1</sup> provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;<sup>2</sup>
2. All documents utilized by you in the rendering of your opinion in this matter;

---

<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writing of every kind, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

<sup>2</sup> "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.

3. Your personal notes, including in electronic and all other forms, regarding this matter;
4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;<sup>3</sup>
5. Your work notes, including in electronic and any other form, regarding this matter;
6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;
7. Meeting notes regarding this matter;
8. Calendars<sup>4</sup> appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;<sup>5</sup>
9. All communications<sup>6</sup> between you and any employee, consultant or agent of you and any person related to this matter<sup>7</sup>;
10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.
11. All recordings, either voice or video, related to this matter.

---

<sup>3</sup> The terms "employee, consultant and agent" reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

<sup>4</sup> Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

<sup>5</sup> This request is specific for the calendar appointments related to this matter.

<sup>6</sup> "Communications" mean any and all written or oral communications, including but not limited to inter- or -intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

<sup>7</sup> "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

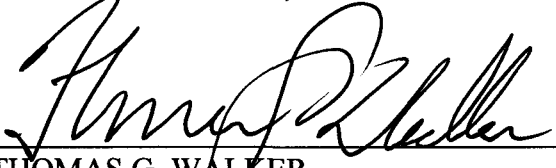
12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010.

COSHO HUMPHREY, LLP

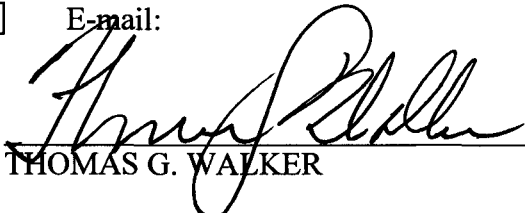
  
THOMAS G. WALKER  
Attorney for Petre Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14<sup>th</sup> day of September, 2010, a true and correct copy of the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Overnight Courier
- ☐ Facsimile:
- ☐ E-mail:

  
\_\_\_\_\_  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_ FILED \_\_\_\_\_ 334  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

SEP 14 2010

J. DAVID NAVARRO, Clerk  
By L. AMER  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
COSH O HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**NOTICE OF TAKING AUDIO-VIDEO  
DEPOSITION *DUCES TECUM* OF RAY  
WETHERHOLT**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of **Ray Wetherholt**, on **Tuesday the 26th day of October 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents<sup>1</sup> provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;<sup>2</sup>
2. All documents utilized by you in the rendering of your opinion in this matter;

---

<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

<sup>2</sup> "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.



3. Your personal notes, including in electronic and all other forms, regarding this matter;
4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;<sup>3</sup>
5. Your work notes, including in electronic and any other form, regarding this matter;
6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;
7. Meeting notes regarding this matter;
8. Calendars<sup>4</sup> appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;<sup>5</sup>
9. All communications<sup>6</sup> between you and any employee, consultant or agent of you and any person related to this matter<sup>7</sup>;
10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.
11. All recordings, either voice or video, related to this matter.

---

<sup>3</sup> The terms "employee, consultant and agent" reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

<sup>4</sup> Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

<sup>5</sup> This request is specific for the calendar appointments related to this matter.

<sup>6</sup> "Communications" mean any and all written or oral communications, including but not limited to inter- or -intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

<sup>7</sup> "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

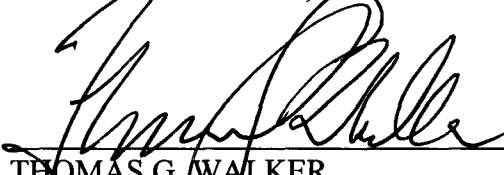
12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010.

COSHO HUMPHREY, LLP



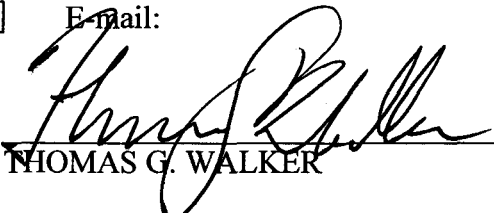
THOMAS G. WALKER  
Attorney for Petra Incorporated

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14<sup>th</sup> day of September, 2010, a true and correct copy of the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☐ Facsimile:  
☐ E-mail:

  
\_\_\_\_\_  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 334

SEP 14 2010

J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**NOTICE OF TAKING THE  
CONTINUED AUDIO-VIDEO  
DEPOSITION *DUCES TECUM* OF  
LAURA KNOTHE**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the continued testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of **Laura Knothe**, on **Wednesday the 20th day of October, 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents<sup>1</sup> provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;<sup>2</sup>
2. All documents utilized by you in the rendering of your opinion in this matter;

---

<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writing of every kind, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

<sup>2</sup> "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.

2. All documents utilized by you in the rendering of your opinion in this matter;
3. Your personal notes, including in electronic and all other forms, regarding this matter;
4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;<sup>3</sup>
5. Your work notes, including in electronic and any other form, regarding this matter;
6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;
7. Meeting notes regarding this matter;
8. Calendars<sup>4</sup> appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;<sup>5</sup>
9. All communications<sup>6</sup> between you and any employee, consultant or agent of you and any person related to this matter<sup>7</sup>;

---

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<sup>3</sup> The terms "employee, consultant and agent" reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

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<sup>5</sup> This request is specific for the calendar appointments related to this matter.

<sup>6</sup> "Communications" mean any and all written or oral communications, including but not limited to inter- or -intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

<sup>7</sup> "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

12. All photographs related to this matter;

13. All billing records related to this matter;

14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;

15. Copies of all drafts of your July 6, 2010 affidavit;

16. All agreements entered into between the City of Meridian and you related to this matter; and

17. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010.

COSHO HUMPHREY, LLP



THOMAS G. WALKER  
Attorney for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14<sup>th</sup> day of September, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☐ Facsimile:  
☐ E-mail:

  
THOMAS G. WALKER



ORIGINAL

NO. \_\_\_\_\_ FILED \_\_\_\_\_ 334  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_  
SEP 14 2010  
J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
COSH O HUMPHREY, LLP  
800 Park Blvd., Suite 790  
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Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**NOTICE OF TAKING AUDIO-VIDEO  
DEPOSITION *DUCES TECUM* OF  
MIKE SIMMONDS**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of **Mike Simmonds**, on **Tuesday the 19th day of October 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents<sup>1</sup> provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;<sup>2</sup>
2. All documents utilized by you in the rendering of your opinion in this matter;

---

<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

<sup>2</sup> "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.

3. Your personal notes, including in electronic and all other forms, regarding this matter;
4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;<sup>3</sup>
5. Your work notes, including in electronic and any other form, regarding this matter;
6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;
7. Meeting notes regarding this matter;
8. Calendars<sup>4</sup> appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;<sup>5</sup>
9. All communications<sup>6</sup> between you and any employee, consultant or agent of you and any person related to this matter<sup>7</sup>;
10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.
11. All recordings, either voice or video, related to this matter.

---

<sup>3</sup> The terms "employee, consultant and agent" reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

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<sup>5</sup> This request is specific for the calendar appointments related to this matter.

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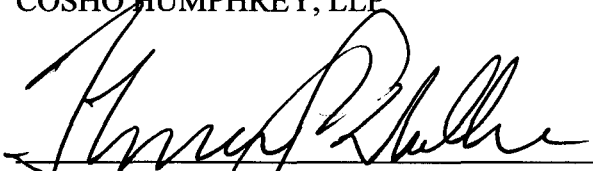
12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010.

COSHO HUMPHREY, LLP

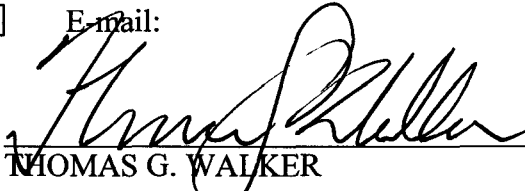
  
THOMAS G. WALKER  
Attorney for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14<sup>th</sup> day of September, 2010, a true and correct copy of the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☐ Facsimile:  
☐ E-mail:

  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
AM. \_\_\_\_\_ PM. \_\_\_\_\_  
SEP 14 2010  
J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
COSH O HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
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E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**NOTICE OF TAKING AUDIO-VIDEO  
DEPOSITION *DUCES TECUM* OF  
JASON NEIDIGH**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated (“Petra”), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of **Jason Neidigh**, on **Wednesday the 27th day of October 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents<sup>1</sup> provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. (“Trout Jones”) for this matter;<sup>2</sup>
2. All documents utilized by you in the rendering of your opinion in this matter;

---

<sup>1</sup> “Documents” means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

<sup>2</sup> “This matter” references the new Meridian City Hall Project, which is the subject matter of this litigation.

3. Your personal notes, including in electronic and all other forms, regarding this matter;
4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;<sup>3</sup>
5. Your work notes, including in electronic and any other form, regarding this matter;
6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;
7. Meeting notes regarding this matter;
8. Calendars<sup>4</sup> appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;<sup>5</sup>
9. All communications<sup>6</sup> between you and any employee, consultant or agent of you and any person related to this matter<sup>7</sup>;
10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.
11. All recordings, either voice or video, related to this matter.

---

<sup>3</sup> The terms “employee, consultant and agent” reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

<sup>4</sup> Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

<sup>5</sup> This request is specific for the calendar appointments related to this matter.

<sup>6</sup> “Communications” mean any and all written or oral communications, including but not limited to inter- or –intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

<sup>7</sup> “Person” means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.



12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010.

COSHO HUMPHREY, LLP



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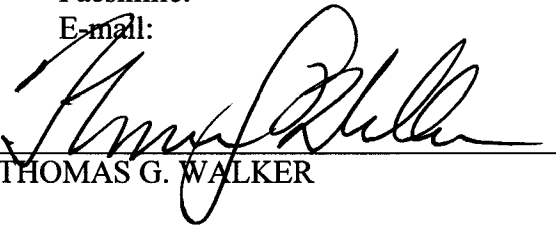
THOMAS G. WALKER  
Attorney for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14<sup>th</sup> day of September, 2010, a true and correct copy of the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☒ U.S. Mail
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- ☐ E-mail:

  
THOMAS G. WALKER

ORIGINAL

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
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[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

★ ★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**NOTICE OF TAKING AUDIO-VIDEO  
DEPOSITION *DUCES TECUM* OF LEE  
COTTON**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated (“Petra”), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of **Lee Cotton**, on **Thursday the 28th day of October 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents<sup>1</sup> provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. (“Trout Jones”) for this matter;<sup>2</sup>
2. All documents utilized by you in the rendering of your opinion in this matter;

---

<sup>1</sup> “Documents” means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

<sup>2</sup> “This matter” references the new Meridian City Hall Project, which is the subject matter of this litigation.

3. Your personal notes, including in electronic and all other forms, regarding this matter;
4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;<sup>3</sup>
5. Your work notes, including in electronic and any other form, regarding this matter;
6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;
7. Meeting notes regarding this matter;
8. Calendars<sup>4</sup> appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;<sup>5</sup>
9. All communications<sup>6</sup> between you and any employee, consultant or agent of you and any person related to this matter<sup>7</sup>;
10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.
11. All recordings, either voice or video, related to this matter.

---

<sup>3</sup> The terms "employee, consultant and agent" reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

<sup>4</sup> Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

<sup>5</sup> This request is specific for the calendar appointments related to this matter.

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12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010.

COSHO HUMPHREY, LLP



THOMAS G. WALKER  
Attorney for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14<sup>th</sup> day of September, 2010, a true and correct copy of the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

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- ☐ E-mail:

  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. *334*

**SEP 14 2010**

J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
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[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF**

**THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**NOTICE OF TAKING AUDIO-VIDEO  
DEPOSITION *DUCES TECUM* OF LEO  
GEISS**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**



YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of **Leo Geiss**, on **Friday the 29th day of October 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

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11. All recordings, either voice or video, related to this matter.

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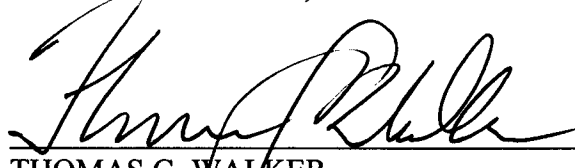
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13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010.

COSHO HUMPHREY, LLP



---

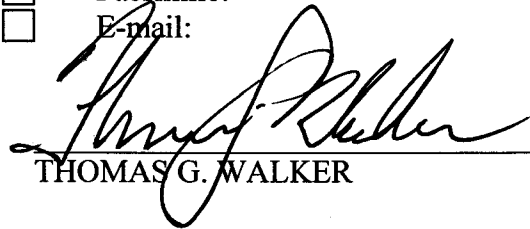
THOMAS G. WALKER  
Attorney for Petra Incorporated

### CERTIFICATE OF SERVICE

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Kim J. Trout, Esq.  
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THOMAS G. WALKER

SEP 14 2010

J. DAVID NAVAHO, Clerk  
By L. AMES  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
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[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF**

**THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**SECOND AMENDED NOTICE OF TAKING  
AUDIO-VIDEO DEPOSITION OF  
CHARLIE ROUNTREE**

**TO: PLAINTIFF/COUNTERDEFENDANT, CITY OF MERIDIAN, BY AND THROUGH  
ITS ATTORNEYS OR RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated,  
by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral

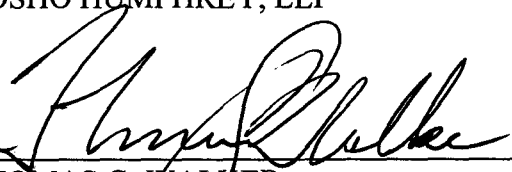
examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of **Charlie Rountree**, on **Monday, the 20th day of September, 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Trout Jones Gledhill Fuhrman, P.A., 225 North 9<sup>th</sup> Street, Suite 820, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010.

COSHO HUMPHREY, LLP

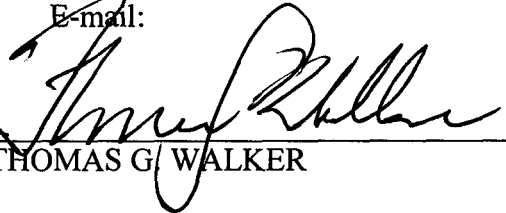
  
\_\_\_\_\_  
THOMAS G. WALKER  
Attorneys for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14<sup>th</sup> day of September, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☒ U.S. Mail
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- ☐ Overnight Courier
- ☐ Facsimile:
- ☐ E-mail:

  
\_\_\_\_\_  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 5:30

**SEP 14 2010**

J. DAVID NAVARRO, Clerk  
By L. AMER  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
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[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF**

**THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**SECOND AMENDED NOTICE OF  
TAKING AUDIO-VIDEO DEPOSITION  
OF WILLIAM L. NARY**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated,  
by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral




examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of **William L. Nary**, on **Wednesday, 22nd day of September, 2010**, beginning at the hour of **10:30 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: September 14, 2010.

COSHO HUMPHREY, LLP

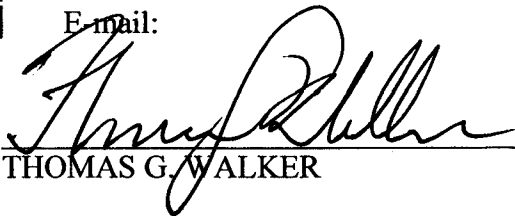
  
\_\_\_\_\_  
THOMAS G. WALKER  
Attorney for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14<sup>th</sup> day of September, 2010, a true and correct copy of the within and foregoing Amended Notice of Taking Audio Video Deposition was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Overnight Courier
- ☐ Facsimile:
- ☐ E-mail:

  
THOMAS G. WALKER

ORIGINAL

FILED 322  
A.M. PM  
SEP 14 2010  
J. DAVID NAVAHRO, Clerk  
BY L. AMES  
DEPUTY

Thomas G. Walker (ISB 1856)  
Mackenzie Whatcott (ISB 6774)  
COSH O HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com)

Attorneys for Defendant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE OF SERVICE OF  
DISCOVERY REQUESTS

NOTICE IS HEREBY GIVEN that on this 14th day of September, 2010, Defendant Petra Incorporated's Twelfth Requests for Production of Documents dated September 14, 2010, together with a copy of this Notice of Service, were served upon counsel for Plaintiff/Counterdefendant, the City of Meridian as follows:

Kim J. Trout  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☐ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☒ Facsimile: 331-1529  
☐ E-mail:

  
\_\_\_\_\_  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_ FILED \_\_\_\_\_ 3:25  
A.M. \_\_\_\_\_ P.M.

SEP 14 2010

J. DAVID NAVAHRO, Clerk  
By L. AMES  
DEPUTY

Thomas G. Walker (ISB 1856)  
MacKenzie Whatcott (ISB 5509)  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
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E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**PETRA INCORPORATED'S SECOND  
DISCLOSURE OF EXPERT WITNESSES  
DATED SEPTEMBER 14, 2010**

Petra Incorporated ("Petra"), by and through its attorney of record, Thomas G. Walker and pursuant to the Order Setting Trial and Other Deadlines and Rule 26(b)(4) of the Idaho Rules of Civil Procedure, hereby discloses the following expert witnesses for hearings and trial of this matter.

16

1. Jerald Scott Frank  
Petra Incorporated  
1097 N. Rosario St.  
Meridian, ID 83642  
(208) 343-4500

Pursuant to I.R.C.P. 26(b)(4)(i):

- A complete statement of all opinions to be expressed. Mr. Frank's opinions are stated in his affidavits dated April 7, 2010, May 4, 2010, May 20, 2010, and September 13, 2010, that were filed in this case and served on the City of Meridian ("Meridian" or "City") during these proceedings.
- The basis and reasons for the opinions. The basis and reasons for the opinions are set forth in Mr. Frank's affidavits, including his more than 30 years of experience in the construction industry.
- The data or other information considered in forming the opinions. The data or other information considered by the witness in forming the opinions is set forth in Mr. Frank's affidavits, including the Project Records.
- Exhibits to be used as a summary of or support for the opinions. Mr. Frank expects to have exhibits prepared for use at hearings and the trial of this case that summarize the opinions set forth in his affidavits. Copies will be provided to the Court and counsel as required by the Court.
- Qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years. Mr. Frank's qualifications are described in his affidavits filed in this case. Mr. Frank has not authored any publications regarding the construction industry within the preceding ten years.
- Compensation. Mr. Frank is not being compensated for his expert opinions given in this case. Mr. Frank is an employee of Petra and is receiving compensation for his personal services rendered for and on behalf of Petra.
- Listing of other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. Mr. Frank has not testified as an expert at trial or by deposition within the preceding four years.

- Rebuttal. Mr. Frank may also provide expert rebuttal testimony and documents in response to evidence that the City of Meridian may put on.
- 2. Eugene R. Bennett  
Petra Incorporated  
1097 N. Rosario St.  
Meridian, ID 83642  
(208) 343-4500

Pursuant to I.R.C.P. 26(b)(4)(i):

- A complete statement of all opinions to be expressed. Mr. Bennett's opinions are stated in his affidavits dated April 7, 2010, May 5, 2010, September 8, 2010 and September 13, 2010, that were filed in this case and served on the City of Meridian ("Meridian" or "City") during these proceedings.
- The basis and reasons for the opinions. The basis and reasons for the opinions are set forth in Mr. Bennett's affidavits, including his more than 39 years of experience in the construction industry.
- The data or other information considered in forming the opinions. The data or other information considered by the witness in forming the opinions is set forth in Mr. Bennett's affidavits, including the Project Records.
- Exhibits to be used as a summary of or support for the opinions. Mr. Bennett expects to have exhibits prepared for use at hearings and the trial of this case that summarize the opinions set forth in his affidavits. Copies will be provided to the Court and counsel as required by the Court.
- Qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years. Mr. Bennett's qualifications are described in his affidavits filed in this case. Mr. Bennett has not authored any publications regarding the construction industry within the preceding ten years.
- Compensation. Mr. Bennett is not being compensated for his expert opinions given in this case. Mr. Bennett is an employee of Petra and is receiving compensation for his personal services rendered for and on behalf of Petra.

- Listing of other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. Mr. Bennett has not testified as an expert at trial or by deposition within the preceding four years.
  - Rebuttal. Mr. Bennett may also provide expert rebuttal testimony and documents in response to evidence that the City of Meridian may put on.
3. Thomas R. Coughlin  
3785 N. Farlight Place  
Boise, ID 83713  
(208) 991-8787

Pursuant to I.R.C.P. 26(b)(4)(i):

- A complete statement of all opinions to be expressed. Mr. Coughlin's opinions are stated in his affidavits dated June 29, 2009, May 5, 2010 and September 13, 2010, that were filed in this case and served on the City of Meridian ("Meridian" or "City") during these proceedings.
- The basis and reasons for the opinions. The basis and reasons for the opinions are set forth in Mr. Coughlin's affidavits, including his more than 26 years of experience in the construction industry.
- The data or other information considered in forming the opinions. The data or other information considered by the witness in forming the opinions are set forth in Mr. Coughlin's affidavits, including the Project Records.
- Exhibits to be used as a summary of or support for the opinions. Mr. Coughlin expects to have exhibits prepared for use at hearings and the trial of this case that summarize the opinions set forth in his affidavits. Copies will be provided to the Court and counsel as required by the Court.
- Qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years. Mr. Coughlin's qualifications are described in his affidavits filed in this case. Mr. Coughlin has not authored any publications regarding the construction industry within the preceding ten years.



- Compensation. Mr. Coughlin is not being compensated for his expert opinions given in this case. Mr. Coughlin is an independent contractor engaged by Cosho Humphrey, LLP to assist with the document production and analysis in this case.
  - Listing of other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. Mr. Coughlin has not testified as an expert at trial or by deposition within the preceding four years.
  - Rebuttal. Mr. Coughlin may also provide expert rebuttal testimony and documents in response to evidence that the City of Meridian may put on.
4. John E. Quapp  
 Petra Incorporated  
 1097 N. Rosario St.  
 Meridian, ID 83642  
 (208) 343-4500

Pursuant to I.R.C.P. 26(b)(4)(i):

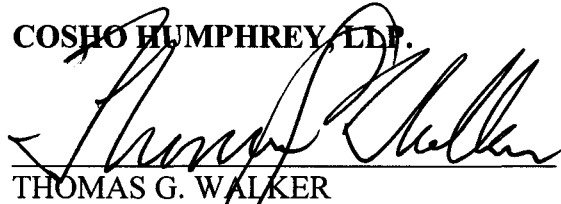
- A complete statement of all opinions to be expressed. Mr. Quapp and the staff at Petra are in the process of preparing calculations of the damages suffered by Petra because of the City's breach of the Construction Management Agreement and breach of the covenant of good faith and fair dealing that are required to put Petra in the same position it would have occupied had Meridian not breached the Construction Management Agreement and covenant of good faith and fair dealing. Such damages include lost past and future earnings, lost business and investment opportunities and interest and finance charges. Mr. Quapp's work is on-going because the damages continue to accrue. This disclosure will be supplemented from time to time as the calculations are completed and as required by order of the Court.
- The basis and reasons for the opinions. The basis and reasons for the opinions consist of an analysis of Petra's historical financial records and a study of the construction and development market in which Petra has conducted its business. This study is intended to measure the total market as compared with Petra's market share, both historically and currently.
- The data or other information considered in forming the opinions. The data or other information considered in forming the opinions include Petra's historical financial

records and a study of the construction and development market in which Petra has conducted its business.

- Exhibits to be used as a summary of or support for the opinions. Mr. Quapp expects to prepare exhibits for use at hearings and the trial of this case that summarize his opinions. Copies will be provided to the Court and counsel as required by the Court.
- Qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years. Mr. Quapp is Petra's Chief Financial Officer. He has a bachelor's of science degree from San Diego State University with a major in accounting. Mr. Quapp has not authored any publications regarding the construction industry or accounting within the preceding ten years.
- Compensation. Mr. Quapp is not being compensated for his expert opinions given in this case. Mr. Quapp is an employee of Petra and is receiving compensation for his personal services rendered for and on behalf of Petra.
- Listing of other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. Mr. Quapp has not testified as an expert at trial or by deposition within the preceding four years.
- Rebuttal. Mr. Quapp may also provide expert rebuttal testimony and documents in response to evidence that the City of Meridian may put on.

DATED: September 14, 2010.

**COSHO HUMPHREY, LLP.**



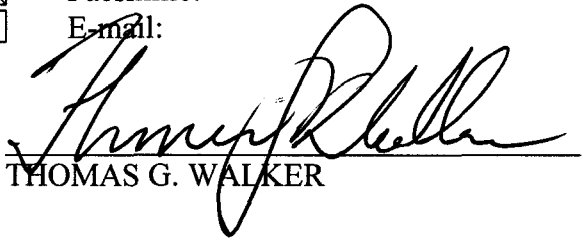
THOMAS G. WALKER  
Attorneys for Petra Incorporated

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14<sup>th</sup> day of September, 2010 a true and correct copy of  
the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☐ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☒ Facsimile:  
☐ E-mail:

  
THOMAS G. WALKER

J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

**Thomas G. Walker (ISB 1856)**  
**Mackenzie Whatcott (ISB 6774)**  
**COSHO HUMPHREY, LLP**  
**800 Park Blvd., Suite 790**  
**P. O. Box 9518**  
**Boise, Idaho 83707-9518**  
**Direct Phone: (208) 639-5607**  
**Cell Phone: (208) 869-1508**  
**Direct Facsimile: (208) 639-5609**  
**E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com)**

**Attorneys for Defendant, Petra Incorporated**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF**

**THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

**VS.**

PETRA INCORPORATED, an Idaho  
corporation,

**Defendant.**

Case No. CV OC 0907257

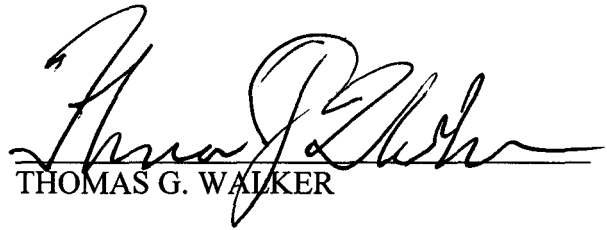
**SUPPLEMENTAL AFFIDAVIT OF  
THOMAS G. WALKER DATED  
SEPTEMBER 14, 2010**

[illegible]

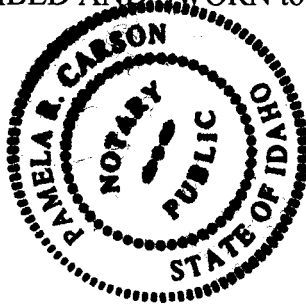
I, THOMAS G. WALKER, being first duly sworn upon oath, depose and state:

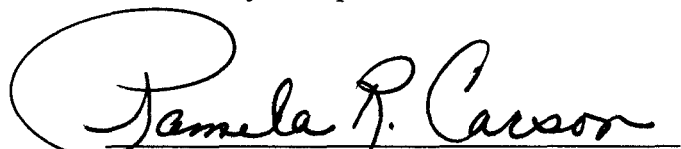
1. I am one of the attorneys of record for the Defendant, Petra Incorporated ("Petra"), in the above entitled action and I make this affidavit based on my own personal knowledge of the facts set forth herein.

2. Attached hereto is the original signed and notarized signature page to the affidavit of Eugene Bennett dated September 8, 2010 In Opposition to the City of Meridian's Motion to Dismiss.

  
THOMAS G. WALKER

SUBSCRIBED AND SWORN to before me this 14<sup>th</sup> day of September, 2010.



  
Notary Public for Idaho  
Residing at Eagle, Idaho  
My commission expires: March 31, 2016.

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14<sup>th</sup> day of September, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

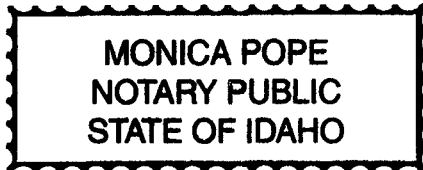
- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Overnight Courier
- ☒ Facsimile
- ☐ E-mail:


  
THOMAS G. WALKER

23. Petra's claim arose on February 24, 2009, the date it was notified by letter that the City of Meridian would not pay Change Order No. 2.

  
EUGENE R. BENNETT

SUBSCRIBED AND SWORN to before me this 8<sup>th</sup> day of September, 2010.

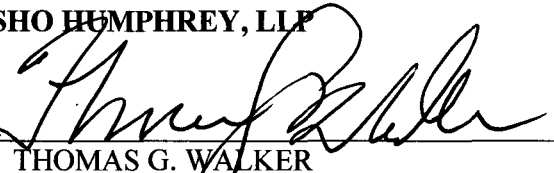


  
Notary Public for Idaho  
Residing at Boise, Idaho  
My commission expires: 4/29/2011

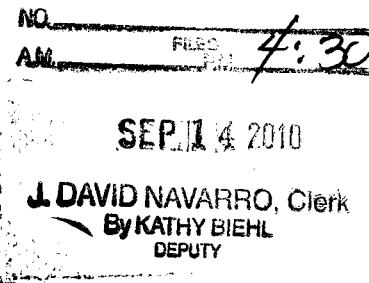
DATED: September 9, 2010.

COSHO HUMPHREY, LLP

By:

  
THOMAS G. WALKER

Attorneys for Petra Incorporated



**KIM J. TROUT, ISB #2468**  
**DANIEL LORAS GLYNN, ISB #5113**  
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.  
225 North 9th Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701  
Telephone: (208) 331-1170  
Facsimile: (208) 331-1529

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**PLAINTIFF CITY OF MERIDIAN'S  
REPLY MEMORANDUM IN SUPPORT  
OF MOTION TO DISMISS (IDAHO  
TORT CLAIMS ACT-I.C. SECTION 50-  
219)**

The Plaintiff City of Meridian (hereinafter referred to as the "City"), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., submits this Reply Memorandum in Support of its Motion to Dismiss all claims asserted by Petra, Incorporated, (hereinafter referred to as "Petra"), regardless of how characterized, against the City based on Petra's failure to comply with the pre-suit notification requirements of the Idaho Tort Claims Act, I.C. § 6-901 *et seq.* ("ITCA").

Although originally filed as a motion to dismiss pursuant to I.R.C.P. 12(b)(6), the City has subsequently moved for summary judgment on the issue of Petra's failure to provide the City with not only a timely required notification of a claim pursuant to the provisions of the Construction

9/13

Management Agreement (hereinafter referred to as the “CMA”), but also the failure to provide any timely, statutorily compliant notice of claim in accordance with the provisions of the ITCA. *See* City’s Motion for Summary Judgment Dated September 1, 2010. As such, the indisputable record reveals that Petra was well aware of its claim for damages from the City as early as January 15, 2007 and as late as July of 2007, apparently under Petra’s present contention, it took no action to present its claim to the City until nearly two years later in March 2009. (Petra Opposition, page 7.) Petra’s purported notice was untimely, was not submitted in accordance with the express requirements of the ITCA, and as such Petra’s claims against the City cannot be asserted in these proceedings.

### **ARGUMENT**

#### **A. Petra Wholly Failed to Submit a Timely Notice of Claim Pursuant to the Provisions of the ITCA.**

There is no dispute from Petra that the City is a municipal corporation which is entitled to pre-suit notice under the ITCA. Rather, it is Petra’s apparent contention that it served a notice of claim upon the City on or about March 16, 2009, which purported notice was within 180 days of the alleged February 24, 2009 accrual of its claim against the City. However, at the outset, even putting aside the issue of timeliness Petra must concede that even this “purported” notice was not served as required by the ITCA. Pursuant to Idaho Code Section 6-906, any notice of claim must be served upon the City Clerk. Petra does not assert that it served its purported notice on the City Clerk, nor could it as the irrefutable evidence is that the City Clerk never received any notice of claim from Petra. (*See* Affidavit of Jaycee L. Holman dated August 30, 2010 filed in Support of Plaintiff’s Motion for Summary Judgment, ¶ 3.)

However, putting aside the clear lack of compliance with I.C. § 6-906, it is evident from the record present in these proceedings that Petra knew, or reasonably should have discovered, the existence of its claims against the City as early as January and as late as July of 2007. Once again this Court must be mindful that Petra’s claim for damages is premised upon the increase in the cost of



the Meridian City Hall Project (hereinafter referred to as the “Project”). Accordingly, as Petra’s claim for damages is premised upon the increase in cost, its claim for damages arose, or reasonably should have been known, upon Petra’s first notice of the fact that the cost of construction exceeded the \$12.2 Million identified in the CMA. As the Idaho Supreme Court recognized in *Mitchell v. Bingham Memorial Hosp.*, 130 Idaho 420, 423, 942 P.2d 544, 547 (1997), “a claimant is not required to know all the facts and details of a claim because such a prerequisite would allow a claimant to delay completion of their investigation before triggering the notice requirement.” *See also Magnuson Properties Partnership v. City of Coeur d’Alene*, 138 Idaho 166, 59 P.3d 971 (2002) (stating that “the 180-day notice period begins to run at the occurrence of a wrongful act, even if the extent of damages is not known or is unpredictable at the time.”).

As set forth in detail in the City’s Memorandum in Support of Motion for Summary Judgment filed on September 1, 2010, as early as January of 2007 Petra began representing to the City that the estimated cost of construction was in excess of \$12.2 Million (\$16,867,220) and, more importantly, represented that Petra’s construction management fee would remain unchanged regardless. (City’s Memorandum in Support of Summary Judgment, pages 5-12)

Rather than present its claim for an increase in its construction management fee based on the increase in cost at that time as required by the CMA’s express terms as well as the ITCA, Petra did nothing. A pattern of silence that it continued in the subsequent representations to the City occurring in February, April, and July of 2007. For this reason, the importance of a timely presentation of a claim, under either the ITCA or the CMA, is evident. Had Petra disclosed in January of 2007, or at anytime thereafter through July 2007, that it would seek a construction management fee in excess of that previously agreed, both parties would have been able to timely address, and potentially resolve, at least one issue of the dispute between the parties that would ultimately arise two years later.

As Petra rightly concedes, this is precisely the purpose to which the ITCA is aimed. (Petra Opposition, page 10.) One of the primary purposes of the ITCA is “to save needless expense and litigation by providing an opportunity for amicable resolution of the differences between parties...” *Pounds v. Denison*, 120 Idaho 425, 426-27, 816 P.2d 982, 983-84 (1991). Petra failed to present a proper and timely notice to the City at a time when it knew, or should have reasonably discovered, it believed it had a claim against the City for an increase in the construction management fee given the increase estimated costs of construction that was actively generating.

“[I]t is clear that failure to comply with the notice requirement bars a suit regardless of how legitimate it might be.” *Driggers v. Grafe*, 148 Idaho 295, 297, 221 P.2d 521, 523 (Ct. App. 2009). Petra did not provide a timely, compliant pre-suit notice to the City as required by the ITCA and its counterclaims against the City must be dismissed as a matter of law.<sup>1</sup>

**B. The Notice Requirements of the ITCA Are Not Exempted by Counterclaims, Compulsory or Otherwise.**

Petra also asserts that its counterclaims should not be dismissed as the ITCA does not apply to counterclaims. Before addressing the substance of this assertion which finds no basis in either the ITCA or Idaho cases interpreting it, Petra’s argument is premised upon the assertion that its counterclaim was timely asserted on May 6, 2009. However, as noted above, Petra’s claims arose in January of 2007 and thus in no sense could the counterclaim be considered timely.

However, the more fatal deficiency to Petra’s assertion is that its argument that the pre-suit notification requirements of the ITCA finds no basis whatsoever in the language of ITCA or any Idaho case interpreting it. As Petra is ultimately forced to concede in its Memorandum in Opposition, the Idaho Supreme Court has not ruled that a counterclaim can comply with the notice-

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<sup>1</sup> Petra makes a curious comment in its Memorandum in Opposition, noting that it is asserting contract claims rather than tort claims in this matter. The character of Petra’s claims is of no import as it is well recognized that the statutory bar of the ITCA applies to all claims, in tort, contract or otherwise. *Sweitzer v. Dean*, 118 Idaho 568, 572, 798 P.2d 27, 31

filing requirements of the ITCA. (Memorandum in Opposition, page 13.) See also *Harms Memorial Hosp. v. Morton*, 112 Idaho 129, 730 P.2d 1049 (Ct. App. 1986).

However, directly contrary to the conclusion of the Oregon Court in *Urban Renewal Agency of the City of Coos Bay v. Lackey*, 549 P.2d 657 (Or. 1976),<sup>2</sup> other jurisdictions have concluded that a counterclaim does not obviate the need for timely and compliant notice. See *City of Racine v. Waste Facility Siting Bd.*, 575 N.W.2d 712, 713-714 (Wis. 1998) (holding that a notice of claim is a “necessary prerequisite to all actions brought against the entities listed in the statute, including governmental subdivisions, whether a tort or non-tort action, and whether brought as an initial claim, counterclaim or cross-claim.”); *Nassau County v. Wolfe*, 273 N.Y.S.2d 984 (N.Y. Dist.Ct. 1966) (holding that the “fact that it was the County which first initiated this litigation does not relieve the defendant from complying with [notice of claim provisions] where defendant seeks affirmative relief by way of a counterclaim” and “[t]he institution of this action by the County creates no waiver or estoppel to assert the requirements of these sections.”); *Department of Transportation v. PSC Resources*, 387 A.2d 393, 396 (N.J. Super. 1978) (joining those other jurisdictions which have “barred the assertion of counterclaims when the defendant has not previously complied with notice of claim provisions of municipal ordinances.”).

Moreover, Petra’s citation to the decisions of federal authorities is inapplicable as the Federal Tort Claims Act expressly provides that counterclaims, and other like pleadings, satisfy the notice requirement. 28 U.S.C.A. § 2675(a) expressly provides that “The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.” Accordingly, no guidance from the federal courts

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(1990); *Cox v. City of Sandpoint*, 140 Idaho 127, 131, 90 P.3d 352, 356 (2003) (“[n]otice of a claim for damages against a city, whether grounded in tort, contract or otherwise, falls under the ‘all claims’ language of I.C. § 50-219.”).

<sup>2</sup> The *Lackey* decision, even if its holding contrary to the other jurisdictions which have addressed the matter could be overcome, is nonetheless distinguishable from Petra’s situation as it provides for

can be had where the federal statute differs from that enacted by the Idaho Legislature. *See Knudsen v. Agee*, 128 Idaho 776, 778-779, 918 P.2d 1221, 1223-1224 (1996) (Court would not look to federal court interpretation of the federal wiretap statutes for creation of “discovery exception” where similar state statute does not expressly contain a discovery exception like the federal statute).

There is no basis for the assertion that the ITCA exempts from its notice requirements claims presented to the City first raised in a counterclaim, even if the counterclaim could be considered as timely presented. Petra’s argument in this regard must be rejected as a matter of law.

**C. The Application of the ITCA is Jurisdictional and Cannot be Waived.**

As a final matter, Petra asserts that the City has waived non-compliance with the ITCA by its failure to include such as an affirmative defense in its original response to Petra’s Counterclaim. However, Petra acknowledges, as it must, that the Idaho Court of Appeals has already addressed the jurisdictional significance of prerequisite notice of the ITCA in *Udell v. Idaho State Bd. Of Land Comm’rs*, 119 Idaho 1018, 812 P.2d 325 (Ct. App. 1991). However, in acknowledging the applicability of the *Udell* decision, Petra somewhat disingenuously asserts that the holding of the Court was “that the State did not waive the defense of failure to comply with Idaho Tort Claims Act by not raising it in its answer.” (Memorandum in Opposition, page 20.)

Petra’s characterization of the holding in *Udell* is simply not accurate. As the Court actually stated:

However, we have not found any case similarly interpreting the Idaho Tort Claims Act, nor do we find any prior appellate decision which would support the argument that such a waiver would be judicially recognized in Idaho. In our view, the sovereign immunity protected by the Act should not be dissipated by ad hoc waivers. Nor do we find that the State's failure to raise its defense in its answer to Udells' complaint, or at the earliest convenience, of any consequence. If the State is immune from liability because of a failure by the claimant to comply with the notice requirements of the Tort Claims Act, that immunity may be raised at any time.

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a limited exception where the counterclaim is brought within the time limits imposed by the Tort Claims Act. As noted above, Petra’s assertions of its claims are not timely.

*Udell*, 119 Idaho at 1020, 812 P.2d at 327. See also, *Christopher v. State ex. Rel. Kansas Juvenile Justice Authority*, 143 P.3d 685, 691-692 (Kan. App. 2006) (holding that notice of claim is a jurisdictional prerequisite to commencing suit that cannot be waived); *Jefferson County Health Services Ass'n, Inc. v. Feeney*, 974 P.2d 1001, 1002 (Colo. 1998) (stating that compliance with tort claims act is "necessary to confer subject matter jurisdiction").

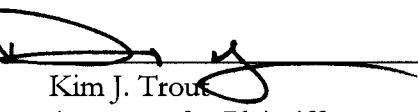
Petra's argument that the City waived its right to assert the defense of noncompliance with the presuit notification requirements of the ITCA is without merit and must be rejected.

### CONCLUSION

For the reasons stated this Court should grant the City's Motion To Dismiss (Idaho Tort Claims Act, I.C. Section 50-219).

DATED this 14 day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.

By:   
Kim J. Trout  
Attorneys for Plaintiff

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14 day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

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Kim J. Trout

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SEP 14 2010

J. DAVID NAVARRO, Clerk  
By KATHY BIEHL  
DEPUTY

**KIM J. TROUT, ISB #2468**

**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.**

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Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**PLAINTIFF'S REPLY MEMORANDUM  
IN SUPPORT OF PLAINTIFF'S  
MOTION TO STRIKE THE  
AFFIDAVITS OF BENNETT,  
COUGHLIN, FRANK AND LEMLEY**

The Plaintiff City of Meridian (hereinafter referred to as the "City"), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., submits this Reply Memorandum in Support of Plaintiff's Motion to Strike the Affidavits of Bennett, Coughlin, Frank and Lemley.

While the specific objections, and the responses, as to various paragraphs of these individual's affidavits is best reserved for oral argument in this matter, a few key points must be raised with regard to the evidentiary record presented by the Defendant Petra Incorporated (hereinafter referred to as "Petra").

DRB

## **ARGUMENT**

### **1. The Affidavits of Bennet, Coughlin, and Frank Should be Stricken to the Extent That They Attempt to Express Expert Opinions.**

In response to the City's Motion to Strike, Petra concedes that "Bennett, Coughlin, and Frank are not designated experts." (Memorandum in Opposition, page 4.) In view of this admission, the Affidavits of Bennett, Coughlin and Frank should be stricken to the extent that they purport to express expert opinions. This would include, but be not limited to, Mr. Bennett's proffered expert testimony on subjects such as, but not limited to, whether or not Petra performed its work as construction manager in accordance with the applicable standard of care and opinions about soil contamination and containment issues. (Affidavit of Eugene Bennett dated August 5, 2010 In Support of Petra's Motion for Summary Judgment, ¶ 10, and 71-73.) Likewise, it would include Mr. Coughlin's opinion that Petra "performed its work as Construction Manager in accordance with this standard of care." (Affidavit of Thomas R. Coughlin dated May 5, 2010, ¶ 7.) Finally, it would require the striking of Mr. Frank's Affidavit wherein he also provides an expert opinion that "[a]t all times during the course of this project, Petra performed its work in accordance with the applicable standard of care for construction managers." (Affidavit of Jerald S. Frank dated May 4, 2010 in Support of Petra Incorporated's Motion for Summary Judgment, ¶ 8.)

### **2. The Lemley Affidavit Should be Striken in its Entirety Given its Utter and Complete Lack of Foundation.**

A review of the Lemley Affidavit reveals that it is comprised entirely of the assimilated investigation, review, and analysis of not only Mr. Lemley, but also that of various disclosed (Richard K. Bauer) and undisclosed employees of Lemley International. For example, Mr. Lemley admits that his opinions were assisted in the formulation by "various [unnamed] employees of Lemley International as well as his own, self-qualified "expert in the field of construction, construction management, and engineering" Richard K. Bauer. (Lemley Aff., ¶ 4-6.) As Mr. Lemley

states, "all of the opinions contained herein are based upon interviews conducted by me and Mr. Bauer and upon our review of the pertinent documents, which we have discussed in detail." (Lemley Aff., ¶ 7.) (Emphasis added.) The Lemley Affidavit then proceeds to detail the various individuals, documents, and sites that either Mr. Lemley or Mr. Bauer, or others, interview, reviewed, or viewed, without any identification as to which one undertook which action.

Thus there is absolutely no foundation for any assertion or opinion expressed in the Lemley Affidavit as it is truly impossible to identify what information he has reviewed, analyzed, relied, and/or rejected in the presentation of his opinions in this matter. There is a complete want of foundation to Mr. Lemley's Affidavit and it must be stricken in its entirety.

### CONCLUSION

For the reasons stated, the City requests that this Court grant its Motion to Strike the Affidavits of Bennett, Coughlin, Frank and Lemley.

DATED this 19 day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
Gourley, P.A.

By: 

Kim J. Trout  
Attorneys for Plaintiff



**CERTIFICATE OF SERVICE**

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Kim J. Trout

NO: \_\_\_\_\_  
A.M.: \_\_\_\_\_ FILED P.M. 4:30

SEP 14 2010

J. DAVID NAVARRO, Clerk  
By KATHY BIEHL  
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**KIM J. TROUT, ISB #2468**

**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.**

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Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**NOTICE OF HEARING**

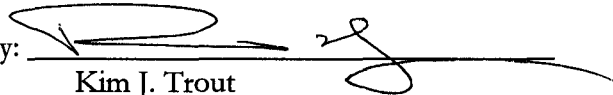
**TO: THE ABOVE NAMED DEFENDANT AND ITS COUNSEL OF RECORD:**

PLEASE TAKE NOTICE, that the hearing on Plaintiff's Motion in Limine re: Expert Testimony of Jack K. Lemley and on Plaintiff's Motion in Limine re: Expert Testimony of Bennett, Coughlin, and Frank will be heard on **Monday September 27, 2010 at the hour of 1:30 p.m. before the Honorable Ronald J. Wilper.** The hearing is scheduled at the Ada County Courthouse located at 200 W. Front St., Boise, ID, 83702.

AKB

DATED this 14<sup>th</sup> day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.

By:   
Kim J. Trout  
Attorneys for Plaintiff

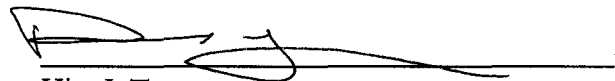
**CERTIFICATE OF SERVICE**

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Kim J. Trout

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SEP 20 2010

J. DAVID NAVARRO, Clerk  
By KATHY BIEHL  
DEPUTY

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Erika Klein (ISB 5509)  
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[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com)  
[mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com).

Attorneys for Defendant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, AN IDAHO  
MUNICIPAL CORPORATION,

Plaintiff,

v.

PETRA, INCORPORATED, AN IDAHO  
CORPORATION. ,

Defendant.

Case No. CV OC 09-07257

**OPPOSITION TO MERIDIAN'S MOTION  
FOR PARTIAL SUMMARY JUDGMENT  
RE: LIABILITY**

Petra Incorporated ("Petra") submits this Memorandum in Opposition to the Motion for Partial Summary Judgment Re: Liability filed by the City of Meridian ("Meridian" or "City").

## 1. INTRODUCTION

The City filed its untimely<sup>1</sup> motion for partial summary judgment on September 2, 2010. Despite accepting the Meridian City Hall with words of praise for Petra, the City now seeks to avoid paying Petra its earned Construction Management fee (“CM fee”) by scouring through the history of the Project in an effort to find fault with Petra’s performance as Construction Manager. Instead of addressing directly the issue of Petra’s CM fee, the City has seized on alleged breaches of the Construction Management Agreement. The City’s arguments ignore and misapply Idaho law on material breach, and gloss over issues of fact. Petra requests that the Court deny the City’s Motion for Partial Summary Judgment.

## 2. LEGAL ANALYSIS

### 2.1 **Petra did not breach Section 4.2 of the Construction Management Agreement and was honest in billing for the Development Strategies Phase.**

The City alleges that Petra materially breached Section 4.2 of the Construction Management Agreement, which states:

Construction Manager shall carefully examine Owner’s Criteria and consult with Owner and Architect in detail about the same in detail. Based on its review and consultations, and with the assistance of Architect, Construction Manager shall prepare and submit to Owner a written report detailing its understanding of Owner’s Criteria and identifying any design, construction, scheduling, budgetary, operational or other problems or recommendations that may result from Owner’s Criteria . . . .<sup>2</sup>

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<sup>1</sup> As a preliminary matter, the City has again ignored the deadlines set by this Court under its scheduling order. Pursuant to the Order Resetting Trial, all summary judgment motions are to be filed and heard no later than September 29, 2010. The City did not file a motion to enlarge time or a motion to alter or amend the scheduling order. Furthermore, to have the matter heard on or before September 29th, the last day the City could have filed its motion was September 1st. Rather than request leave of the Court, City again chooses to ignore the Order and schedule the hearing for October 4th – five days past the deadline.

<sup>2</sup> Affidavit of Gene Bennett dated April 7, 2010 (“Bennett April 7 Affidavit”) at ¶ 8, Exh. A.

Factually, the City's allegation is difficult to grasp in light of the undisputed fact that the City *never* provided Petra with a discrete document setting forth the Owner's Criteria. Section 3.2 of the Construction Management Agreement states: "Owner shall provide Construction Manager with Owner's preliminary planning and programming information regarding the Project, including, but, not limited to, Owner's purposes, concepts, desires and any design, construction, scheduling, budgetary or operational needs, restrictions or requirements, as the same may be amended from time to time ('Owner's Criteria')."<sup>3</sup> Providing a discrete document setting forth the Owner's Criteria was a condition precedent to Petra providing a discrete written report in response. The City acknowledges in its brief that it did not provide the Owner's Criteria, as stated in Gene Bennett's testimony, "*The owner didn't provide us with the owner's criteria*, and Petra did not produce the report."<sup>4</sup>

Rather, the parties never contemplated that Petra would provide the type of written report that the City retroactively claims it was owed. As Gene Bennett testified, Petra met every two weeks with the City, the Architect, and Engineers during the Development Strategies Phase.<sup>5</sup> Commencing in approximately April 2007, Petra presented periodic updates to the City that were reviewed by the Mayor, the City Council and City staff during the meetings of the Mayor's Building Committee and City Council workshop meetings.<sup>6</sup> And, Petra provided detailed monthly reports commencing in December 2007 and continuing through November 2008.<sup>7</sup> The

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<sup>3</sup> *Id.*

<sup>4</sup> Affidavit of Kim J. Trout dated Sept. 1, 2010, at ¶ 6(a), Exh. D-1, (Depo. Gene Bennett 66:2-16 (Feb. 19, 2010)(emphasis added)).

<sup>5</sup> Affidavit of Gene Bennett dated May 5, 2010 ("Bennett May 5 Affidavit") ¶ 80.

<sup>6</sup> Affidavit of Gene Bennett dated Sept. 13, 2010 ("Bennett Sept. 13 Affidavit") at ¶64.

<sup>7</sup> *Id.* ¶65.

development of the Owner's Criteria and the responses and reports generated by Petra and the Architect were the result of a collaborative effort among the parties that evolved over time.<sup>8</sup> As Gene Bennett details in his affidavit: "There was never a point when a report could have been issued that would have been relevant and not immediately outdated."<sup>9</sup> The Development Strategies Phase was ongoing and Petra addressed the City's evolving design, construction, scheduling, budgetary, operational issues in a series of meetings, reports, and other interactions.<sup>10</sup>

Likewise, the City is incorrect in alleging Petra was dishonest in its billing for work done during the Development Strategies Phase. The City claims that because Petra did not provide the discrete written report, it should not have received its fee for the Development Strategies Phase in Pay Application No. 1.<sup>11</sup> This argument ignores the reality of the Project as described above. It is simply not reasonable to argue that Petra did not earn its fee for its work during the Development Strategies Phase when it provided updates every two weeks and was responding on a near daily basis to the City's ever evolving and expanding plans.

In addition to being disconnected from the basic facts, the City's arguments regarding the written report and Petra's fee for Development Strategies Phase have no support in the law.

First, the City is estopped from raising these arguments at this late date. The time to raise the issue was prior to paying Petra its fee based on Pay Application No. 1. In other words, the City should not be allowed to now complain – four years later – that although the City paid Petra

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<sup>8</sup> Affidavit of Eugene R. Bennett dated Sept. 20, 2010 ("Bennett Sept. 20 Affidavit") at ¶¶15, 17-19; Bennett May 5 Affidavit at ¶¶80-94.

<sup>9</sup> Bennett Sept. 20 Affidavit at ¶ 16.

<sup>10</sup> *Id.* at ¶ 17.

<sup>11</sup> Affidavit of Kim J. Trout dated Sept. 1. 2010, at Exh. E.

its fee with full knowledge of what had transpired prior to presenting Pay Application No. 1, that Petra had not provided a discrete written report, it was owed this report and that the failure to provide it is a material breach of the Construction Management Agreement.<sup>12</sup>

Simply put, despite the City's hyperbole, the City was always well-informed in all its decisions. This is a textbook example of why in the construction context the doctrine of waiver developed. As one court put it:

A party to a contract may waive, by express agreement or by its course of conduct, its legal right to strict performance of the terms of a contract. The waiver doctrine is intended to prevent the waiving party from lulling another into a false belief that strict compliance with a contractual duty will not be required and then suing for noncompliance.

*Lake County Grading Co. of Libertyville, Inc. v. Advance Mech. Contractors, Inc.*, 654 N.E.2d 1109, 1118 (Ill. Ct. App. 1995) (citations omitted).

Lastly, even setting aside the fact that there was a modification of terms of the Construction Management Agreement, Petra's alleged failure to provide a single written report was not a material breach. Petra fully performed under the Construction Management Agreement. The City received a state-of-the-art, brand new building, built in accordance with the plans and specifications approved and accepted by the City's officials. Despite Petra's full performance, the City has not paid Petra for all of its services and reimbursable expenses. Yet, the City claims that Petra's failure to prepare a single report – based upon a review of information that was not provided by City – constitutes a “material” breach of the contract. This claim is simply not supported by either the facts or law.

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<sup>12</sup> Bennett Sept. 20 Affidavit at ¶ 13.



In support of its argument, the City cites *J.P. Stravens Planning Associates, Inc. v. City of Wallace*, 129 Idaho 542, 928 P.2d 46 (Ct. App. 1996), but does not discuss the case or apply its legal principles to this case. The case law does not support City's argument. "A substantial or material breach of contract is one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." *Ervin Const. Co. v. Van Orden*, 125 Idaho 695, 699, 874 P.2d 506, 510 (1993). "A breach of contract is not material if substantial performance has been rendered." *J.P. Stravens*, 129 Idaho at 545, 928 P.2d at 49 (citing *Mountain Restaurant Corp. v. ParkCenter Mall Associates*, 122 Idaho 261, 265, 833 P.2d 119, 123 (Ct. App. 1992). "Substantial performance is performance which, despite a deviation from contract requirements, provides the important and essential benefits of the contract to the promisee." *Id.* A material breach of contract excuses the other party's performance. *Id.* "Whether a breach of contract is material is a question of fact." *Id.*

The evidence overwhelmingly supports a finding that Petra substantially performed its duties and responsibilities in this case. Petra completed the construction of the building, all certificates of occupancy were issued and the City has been occupying the Project since the temporary occupancy permits were issued on October 15, 2008.<sup>13</sup> The City held a grand opening ceremony on November 21, 2008 during which Mayor DeWeerd and Council President Charlie Roundtree publically praised Petra for its work. The City's tardy claim that Petra did not provide a single written report is not material. Moreover, at a minimum, whether or not a breach is material is a question of fact. *J.P. Stravens*, 129 Idaho at 545, 928 P.2d at 49; *Independence*

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<sup>13</sup> Bennett April 7 Affidavit at ¶¶87-92; Bennett May 5, 2010 Affidavit ¶ 102, Exh. 38.

*Lead Mines Co. v. Hecla Mining Co.*, 143 Idaho 22, 28, 137 P.3d 409, 415 (2006). This was a \$20+ million project that was completed more than a year ago. Going back in time to find instances where Petra allegedly did not cross every “t” or dot every “i” is why the doctrines of material breach and substantial completion exist in the construction context. *See Bruner & O’Connor on Construction Law*, § 18:12 (West 2002).

**2.2 Petra correctly administered the Prime Contracts in accordance with its duties under the Construction Management Agreement.**

Next, the City argues Petra failed in its duty to administer the Prime Contracts. The City’s analysis is flawed. First, the City waived its right to make these after-the-fact claims, years after the alleged breaches occurred and in direct contradiction to the City’s course of conduct. Second, the City’s argument glosses over key factual issues, ignoring the standard to be applied on summary judgment. Third, the alleged breaches are not material.<sup>14</sup>

Specifically, the City alleges Petra did not properly administer the Prime Contracts, particularly with regard to Rule Steel. The City alleges (1) Change Orders No. 1 and 2 for Rule Steel did not contain an extension of time, but “TBD” was added later by Petra; (2) there is no evidence in the record that Petra enforced the requirement that Rule Steel make a timely, written, and substantiated request for a time extension due to a weather delay; (3) Petra did not first apply Rule Steel’s delay against the built-in “float” of thirty days for the benefit of the City; (4) Petra waived the City’s right to collect no less than \$15,000 in liquidated damages; (5) Petra did not

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<sup>14</sup> This is particularly true in light of the fact that the City is unable to quantify or even explain what damages it sustained as a result of the alleged breaches.

ensure that a Certificate of Substantial Completion was issued by the Architect for each Prime Contractor. These arguments lack merit.

### **2.2.1 The City has waived its right to make these claims.**

First, as a general matter applicable to all of the City's arguments, each of these arguments is waived. Waiver is the "voluntary, intentional relinquishment of a known right or advantage." *Brand S. Corp v. King*, 102 Idaho 731, 734, 639 P.2d 429, 432 (2005). The waiver doctrine is intended to prevent a waiving party from lulling another into a false belief that strict compliance with contractual duty will not be required and then sue for nonperformance. *See, Lake County Grading Co. of Libertyville v. Advance Mechanical Contractors*, 654 N.E. 2d 1109, 1119 (Ill. Ct. App. 1995) (In building context waiving party should not be allowed to lull another party into noncompliance with contractual terms and then sue for nonperformance).

The Idaho Supreme Court has addressed an analogous situation in *Obray v. Mitchell*, 98 Idaho 533, 567 P.2d 1284 (1977). In *Obray*, a subcontractor sought payment for additional work it had performed at the request of the general contractor. 98 Idaho at 535, 567 P.2d at 1286. In defense, the contractor argued that the subcontractor was not entitled to be paid because he had not complied with certain provisions in the contract. *Id.* at 536, 567 P.2d at 1287. The subcontractor demonstrated that the contractor ignored the contractual requirements during the course of the contract. *Id.* In awarding additional compensation to the subcontractor for the extra work it had performed, the Court held that the contractor could not now insist on a contractual requirement he had previously ignored. *Id.* The Court held the contractor waived these requirements and ordered him to pay the subcontractor for the additional

performed. *Id.*; see also, *Swenson v. Lowe*, 486 P.2d 1120 (Wash Ct. App. 1971) (Contractor entitled to compensation for services rendered where owner waived strict requirement of contract terms during course of construction).

Each of the City's arguments is waived. If the City had issues with Petra's performance under the Construction Management Agreement with regards to how Petra enforced the Prime Contracts, it had numerous opportunities to voice those concerns. For example, Gene Bennett details how the pay applications for the Prime Contractors were handled:

(a) After compiling the pay application Petra would submit it to LCA on or about the 5th of the following month for their review and approval; (b) If LCA had any questions Petra would address them prior to LCA certifying the pay application, the Architects certification provided that the Work had progressed as indicated, the quality of the Work was in accordance with the contract Documents and that the Contractors and vendors were entitled to payment of the amounts certified; (c) The certified pay application was then delivered to Keith Watts, the City's authorized representative and purchasing agent, for his and Councilman Keith Bird's review and approval; (d) Any questions that the City would have would be addressed by discussion, email or a meeting prior to the City approving and dispersing the payments to the contractors and Petra.<sup>15</sup>

The City made its decisions with all available information at hand. The City has waived the right to go back years and argue that something was amiss. The City approved Petra's conduct at every turn. And most importantly, the City occupied the Project and put it to beneficial use.<sup>16</sup> The City has waived all the following arguments, which in any event lack merit, as will be discussed below.

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<sup>15</sup> Bennett Sept. 13 Affidavit at ¶ 84.

<sup>16</sup> Bennett May 5 Affidavit at ¶ 102.

### **2.2.2 Petra correctly administered the Rule Steel Contract with regard to Rule Steel Change Orders No. 1 and 2.**

The City has offered no evidence that Petra failed to properly administer Rule Steel's contract with regard to Change Orders No. 1 and 2. Instead, the City is inviting the Court to speculate in its favor based on the City's bare assertions.

As a preliminary matter, the City alleges that Change Order No. 1 and No. 2 were submitted to the City with "no additional time." These were then altered by Petra with the notation "To Be Determined." In support of this allegation, the City cites to the Affidavit of Steven J. Amento.<sup>17</sup> Amento only speaks about Change Order No. 1.<sup>18</sup> Therefore, nothing is before the Court regarding Change Order No. 2.

Therefore, the question is whether Petra handled Change Order No. 1 correctly and in conformity with any obligation it had under Section 7.2.4 of the Prime Contracts. Section 7.2.4 states "Any Change Order shall constitute final and full settlement of all matters relating to or affected by the change in the Work . . . ." <sup>19</sup> In support of the allegation that Petra "failed to enforce this provision," the City proffers the testimony of Amento, their retained expert. This use of expert testimony puts the cart before the horse. The City cites no factual allegations in the record in support of the City's assertion. The City cites no factual evidence that Petra was not authorized to make the notation on the two versions of Change Order No. 1, or that anyone was misled by it. The City only offers the two documents, one with the relevant handwriting and one without, and then makes the allegation via its expert witness.

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<sup>17</sup> Affidavit of Steven J. Amento dated July 2, 2010 in *Opposition to Defendant's Motion for Summary Judgment* ("Amento Affidavit").

<sup>18</sup> *Id.* at ¶ 24(c).

<sup>19</sup> Affidavit of Kim J. Trout dated Sept. 1, 2010, at Exh. F.

More importantly, the facts are otherwise. As Tom Coughlin details in his affidavit, the parties, including the City, were all aware that the timing issue “was in flux” and still needed to be addressed with regard to Rule Steel at a later date.<sup>20</sup> There was no intent to deceive.<sup>21</sup> This agreement with the City modified Section 7.2.4, to the extent it even applies. Again, the City leaps to a conclusion unsupported by the facts.

In fact, the City’s argument with regard to Rule Steel Change Order No. 1 is emblematic of its entire approach to this case. The City imagines a world where a 20+ million dollar public works project, involving at least 53 contractors and hundreds of change orders, ASIs and RFIs proceeds to the very letter of each of the multiple standard form contracts. This defies common sense and simply ignores the reality of the construction world: “Construction, even on a normal and seemingly routine project, is an extraordinarily complex process – rarely proceeding as planned’ in strict conformance with the requirements of contract documents; subject to a ‘range of reasonably expected adverse conditions’ requiring skillful coordination of numerous tradesman; subject to changes invoked under agreements of the parties or due to conditions beyond the control of the parties . . . .” Bruner & O’Connor on Construction Law.

### **2.2.3 Petra received written requests from Rule Steel for time extensions**

The City has offered no evidence that Petra did not “require timely, written, and legitimate request for delay.” Evidence in the record suggests Petra did receive written requests from Rule Steel. The City makes an allegation that no such request from Rule Steel exists and then cites to a paragraph in its counsel’s affidavit indicating he was unable to locate such a

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<sup>20</sup> Affidavit of Thomas Coughlin dated September 20, 2010 (Coughlin September 20, 2010 Affidavit) at ¶¶ 12-18.

<sup>21</sup> *Id.* at ¶19.

document. As Tom Coughlin states in his affidavit, Rule Steel made written requests for time extensions.<sup>22</sup> Tom Coughlin testified that Petra received written notice from Rule Steel.<sup>23</sup> The City's allegation is contrary to the facts.

**2.2.4 Petra correctly addressed the provisions of Section 8.3.1 in the Prime Contracts.**

The City argues that Petra did not address the provisions of Section 8.3.1 in the Prime Contracts. Although the City cites nothing other than the contract itself to support this factual allegation, it appears to be based on Mr. Amento's affidavit. Mr. Amento alleges, without any basis in fact or even a purported basis in fact, that Petra recommended an extension to Rule Steel "without making an adjustment for the 30-days float allowance as required by contract."<sup>24</sup> Mr. Amento then recites Section 8.3.1 and moves on to other issues.<sup>25</sup> In other words, in asking for summary judgment with respect to Petra's breach in failing to address Section 8.3.1, the City offers no evidence, other than to say there is no "evidence in the record that Petra even attempted to apply § 8.3.1." The City is the plaintiff in this case and has the burden of proof at trial. *O'Connor v. Harger Const., Inc.*, 145 Idaho 904, 910, 188 P.3d 846, 852 (2008). As the moving party on summary judgment, "the initial burden of establishing the absence of a genuine issue of material fact rests with that party." *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 531, 887 P.2d 1034, 1038 (1994). The City has failed in its burden.

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<sup>22</sup> Coughlin September 20, 2010 Affidavit at ¶ 11, 27.

<sup>23</sup> See Affidavit of Thomas G. Walker dated September 20, 2010 at Exhibit A; Coughlin depo: 37:15-42:17, Feb, 26, 2010.

<sup>24</sup> Amento Affidavit at ¶ 24(b).

<sup>25</sup> *Id.*

More importantly, neither Mr. Amento nor the City's representatives understand how "float" is defined in the Prime Contracts or how the concept of a "float" functions in a project like this one. Section 8.3.1 of the Prime Contract states: "The Owner and Contractor acknowledge and agree that the critical path construction schedule for the Project incorporates not less than thirty (30) days of 'float' for owner caused delays and that an extension of time is warranted only if events identified above cause delay on the critical path in excess of such float days." A "float is 'owned by the project' rather than by either the contractor or the owner . . . ." Bruner & O'Connor on Construction Law 15:9 (West 2002).

Here, the 30 day float was consumed by the delays that had already occurred for unforeseen conditions.<sup>26</sup> By the time Rule Steel started, the Project had already been delayed.<sup>27</sup> As detailed by Tom Coughlin in his affidavit, the 30-day float issue was not applicable to the Rule Steel change orders.<sup>28</sup> Again, the City's argument is contrary to the undisputed facts and to any reasonable interpretation of the relevant contracts.

#### **2.2.5 Petra obtained all allowable Liquidated Damages on behalf of the City**

The City argues that Petra's alleged failure to apply Section 8.3.1 to the Rule Steel liquidated damage analysis resulted in a "wrongful waiver by Petra of not less than \$15,000 in liquidated damages." Again, the City does not provide any factual support for this assertion. It appears to stem from Mr. Amento's affidavit. Amento is of the opinion that Rule Steel should have been assessed more liquidated damages.

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<sup>26</sup> Coughlin Affidavit at ¶¶ 30-31

<sup>27</sup> *Id.* at ¶30.

<sup>28</sup> *Id.* at ¶¶ 28-31.



The City glosses over the analysis given the City by Tom Coughlin and the fact that the City agreed with the terms of the Rule Steel settlement.<sup>29</sup> Coughlin's communications with the City are in the record.<sup>30</sup> The City agreed with Coughlin's recommendations.<sup>31</sup> The City provides no indication or analysis as to how Petra waived \$15,000 in liquidated damages. It is one thing for the City in November of 2007 to take issue with Petra's analysis of the Rule Steel situation when it comes up, it is quite another to take issue with it almost three years later, and after accepting and occupying the Project. Rule Steel was one of 53 contractors who worked on the Project. Rule Steel was assessed liquidated damages in a manner Petra considered appropriate and that the City approved with full knowledge of all relevant circumstances. As Richard Bauer details in his affidavit, Petra's handling of all potential liquidated damages was within the standard of care.<sup>32</sup>

As addressed above, by accepting Petra's assessment of the Rule Steel situation and moving forward, the City waived its right to object to Petra's conduct. Even if it was objectionable on some grounds, the City does not even explain how it could constitute a material breach of the Construction Management Agreement.

#### **2.2.6 Petra fulfilled its duties with regard to ensuring Substantial Completion of the Project.**

The City argues that Petra breached the Construction Management Agreement by failing to ensure the Architect delivered a Certificate of Substantial Completion to the City for each of the Prime Contractors. It is important to note carefully what the City argues here. The City does

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<sup>29</sup> *Id.* at ¶¶ 13-23.

<sup>30</sup> *Id.* at ¶ 22, Exh. 11.

<sup>31</sup> *Id.* at ¶¶ 13-23.

<sup>32</sup> Affidavit of Richard Bauer dated Sept. 13, 2010 ("Bauer Sept. 13 Affidavit") at ¶¶ 38-40.

not argue that any of the Prime Contractors failed to achieve Substantial Completion. The City only argues that Petra apparently failed to ensure that the Architect delivered a Certificate of Substantial Completion for each of the Prime Contractors.

Thus, despite the fact that the City accepted the Project when it was completed, despite the City making final payment to each of the Prime Contractors, despite the City agreeing with Petra and the Prime Contractors regarding the substantial completion dates, the City now wants to argue that because Architect failed to deliver certain certificates, Petra is in breach of the Construction Management Agreement. This argument lacks merit for a number of reasons.

First, Petra did not have a duty under the Construction Management Agreement to deliver certificates of substantial completion. Again, Petra's duties must arise from the Construction Management Agreement. The City cites Section 4.7.1, which provides that "Construction Manager shall have and perform those duties, obligations and responsibilities set forth in the construction agreements [Prime Contracts] between Owner and each Contractor." Therefore, with this reference, the Construction Management Agreement imposes on Petra as Construction Manager those duties imposed on it by Prime Contracts. But the Prime Contracts impose no such duty, nor does any other document.

The City's interpretation of Section 9.8.2 of the Prime Contract is erroneous. This section does not impose an affirmative duty on Petra to deliver the certificates of substantial completion. Section 9.8.2 states:

When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion . . . . The Certificate of Substantial

Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate.

This language imposes this duty on the Architect, not Petra.

Furthermore, Petra was not given the authority to legally compel the Architect to do anything. The relevant contractual document is the Professional Services Agreement, entered into between the City and the Architect, LCA, on July 11, 2006.<sup>33</sup> The LCA Agreement was never assigned to Petra.<sup>34</sup> In other words, the City did not designate Petra as its authorized representative vis-à-vis the Architect.<sup>35</sup> The LCA Agreement does not include a provision stating that the Construction Manager will administer the LCA Agreement.<sup>36</sup> This would be customary if in fact the City wanted the Construction Manager to control the design of the Project, which it did not.<sup>37</sup> Instead, the City chose to retained control over the design and did not make Petra the City's agent with regard to the Architect.<sup>38</sup>

Therefore, the contractual relationship between Petra and the Architect is encapsulated in paragraph 3.3 of the Construction Management Agreement. This section states: "Construction Manager shall consult and coordinate with Architect as needed to fulfill its duties hereunder, and shall assist the Architect as need [sic] for Architect to fulfill its duties to Owner under the Architectural Agreement." The only authority the City cites for its argument that Petra had a duty to compel the Architect to deliver the certificates to the City is a section of a Construction Management Plan that is not a contract and does not grant any authority even if it was a contract.

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<sup>33</sup> Bauer Sept. 13 Affidavit at ¶ 22.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

This document simply outlines methods and procedures that may be utilized by Petra as Construction Manager. There is no reasonable reading of this section that would lead to the conclusion that it created a legal right on the part of Petra to command performance by the Architect regarding the certificates of substantial completion. This type of relationship was specifically *not* intended by the City. The contractual relationships between the parties should be determined with reference to contract documents (the Construction Management Agreement and the LCA Professional Services Agreement), not with reference to methods and procedures handbooks.

Therefore, the City's contorted reading of various agreements and documents does not withstand scrutiny. Petra had no affirmative duty under either the Construction Management Agreement or any of the Prime Contracts to command the Architect to deliver the certificates of substantial completion. In any event, the City's point is immaterial. Substantial Completion was achieved by each of the Prime Contractors on a date – October 15, 2008 – agreed upon by all parties, including the City.<sup>39</sup> The City mischaracterizes substantial completion. It is not “achieved when the Architect has prepared ‘a certificate of Substantial Completion which shall establish the date of Substantial Completion . . . .’”<sup>40</sup> On the contrary, substantial completion is “the stage in the progress of the Work as certified in writing by the Construction Manager and Architect when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended

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<sup>39</sup> Bennett Sept. 20 Affidavit at ¶ 22.

<sup>40</sup> The City's *Memorandum in Support of Motion for Partial Summary Judgment Re: Liability* at pg. 9 (emphasis removed).

use.”<sup>41</sup> Notably, the Meridian City Hall was substantially completed on October 15, 2008, a date agreed upon by all parties.<sup>42</sup> Likewise, the Prime Contractors with the exception of Rule Steel each achieved substantial completion.<sup>43</sup>

Second, even if it were true that Petra had the duty to ensure that the Architect deliver the certificates of substantial completion, any failure by Petra to do so would not be a material breach of the Construction Management Agreement. As stated above, “a substantial or material breach of contract is one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract.” *Ervin Const. Co. v. Van Orden*, 125 Idaho 695, 699, 874 P.2d 506, 510 (1993). “Substantial performance is performance which, despite a deviation from contract requirements, provides the important and essential benefits of the contract to the promisee.” *J.P. Stravens Planning Associates, Inc. v. City of Wallace*, 129 Idaho 542, 545, 928 P.2d 46, 49 (Ct. App. 1996).

The City quickly jumps to the language in the Prime Contracts, but the focus should be on the terms of the Construction Management Agreement. The City’s “objective for the Project is to develop a new cost efficient city hall facility and public plaza on the Site.” The City retained Petra “to help it achieve the objectives set forth in Section 3.1 above by managing and coordinating the design and construction of the Project on behalf of the [City].” This was the purpose of the Project. Any failure to ensure that the Architect delivered certificates of substantial completion for prime contracts, even if this can be considered a duty of Petra, is not a material breach of Petra’s duty under Section 4.7.1. The Project was completed. All certificates

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<sup>41</sup> Affidavit of Kim J. Trout dated Sept. 1, 2010, at Exh. F.

<sup>42</sup> Bennett Sept. 20 Affidavit at ¶ 22.

<sup>43</sup> Bennett Sept. 20 Affidavit at ¶ 23.

of occupancy were issued and City has been occupying the Project since the temporary occupancy permits were issued on October 15, 2008.<sup>44</sup> The City held a grand opening ceremony on November 21, 2008, during which it praised Petra for its work.

Therefore, even if Petra was at fault for failing to ensure delivery of the certificates of substantial completion, Petra did not materially breach the Construction Management Agreement. At a minimum, this is a question of fact. *See Ervin Construction*, 125 Idaho at 702, 874 P.2d at 513. On summary judgment, construing the facts in favor of the non-moving party, the Court should deny the City's motion with respect to the Certificates of Substantial Completion and Petra's liability.

**2.2.7 Petra fulfilled its duty to protect the City from defective or deficient Work.**

The City accuses Petra of not protecting the City against defective or deficient work. The City does not actually identify a single defect in materials and workmanship, rather it simply refers the Court to affidavits previously filed by City with the expectation that the Court will find the evidence to which it is referring. In any event, whatever defects the City has allegedly discovered fall within the warranties.<sup>45</sup> Items identified after the punch list inspection are resolved under the warranties.<sup>46</sup> Once the building is turned over to the owner, the owner is responsible for administering the warranties.<sup>47</sup> Petra did not have any responsibility under the Construction Management Agreement to administer the warranties.<sup>48</sup>

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<sup>44</sup> Bennett April 7 Affidavit at ¶¶87-92; Bennett May 5, 2010 Affidavit ¶ 102, Exh. 38.

<sup>45</sup> Bauer Sept. 13 Affidavit at Exh. 504.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Bauer Sept. 13 Affidavit at ¶34.

The City's repeated allegations regarding defects stem from a misunderstanding of a construction manager's role and Petra's contractual duties under the Construction Management Agreement. A construction manager is not liable for every defect (patent or latent) that may manifest itself months after a project is completed. This is the reason for warranties. An agency construction manager not-at-risk observes the work while it's underway, monitors its progress, checks for consistency with the contractor's pay applications, checks for consistency with the contractor's reports of scheduled progress, notes safety issues, and gathers information for coordinating between contractors.<sup>49</sup> If the construction manager observes an apparent defect, he may contact an inspector to do a technical inspection.<sup>50</sup> The City kept the right and obligation to conduct inspection and testing.<sup>51</sup>

**2.2.8 The City's claim that Petra had a fiduciary duty to the City is contrary to the intent of the parties, the standards applicable to construction managers and relevant law.**

Lastly, the City persists in its argument, both here and now apparently in seeking punitive damages, that Petra owed the City a fiduciary duty. This assertion ignores significant problems inherent in the language of the Construction Management Agreement. Despite the appearance of the phrase "trust and confidence," the parties did not intend a fiduciary relationship. The language of the Construction Management Agreement does not support this conclusion. Petra's representatives have testified they never intended this relationship, which is relevant in interpreting this ambiguous language. Further, the City drafted the document and this ambiguity should be interpreted against the City.

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<sup>49</sup> Bauer Sept. 13 Affidavit at ¶ 32.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

The City focuses on the words “trust and confidence” in Section 1.1. But these words must be read in the context of the entire agreement. Section 1.1 also states: “Construction Manager further covenants that Construction Manager will perform its services under this Agreement, in the exercise of ordinary and reasonable care and with the same degree of professional skill, diligence and judgment as is customary among construction managers of similar reputation performing work for projects of a size, scope and complexity similar to the Project.” This language does not describe the heightened duties of a fiduciary.

Even more importantly, Section 2.8 states: “Construction Manager acknowledges that it is an independent contractor and not an employee *or agent* of Owner” (emphasis added). In other words the Construction Management Agreement contains a term of art often used the fiduciary context, but goes on to describe a standard relationship, and then states Petra *is not even an agent of the City*, but only a mere independent contractor. This confusing language, drafted by the City, does not support the City’s simplistic assertion that a fiduciary relationship was created in this agreement. At a minimum, the Construction Management Agreement is ambiguous on this point. As such, it should be construed against the drafter.

Furthermore, Petra did not intend to enter into a fiduciary relationship. As testified to in the affidavits of Jerald S. Frank and Eugene R. Bennett, the words “trust and confidence” refer only to the standard commercial relationship that exists between an owner and an agency construction manager not-at-risk. “Owners don’t do business with construction managers they don’t trust and have confidence in, and construction managers don’t represent owners that they



don't trust and have confidence in." In other words, the relationship of trust and confidence is reciprocal.<sup>52</sup>

The understanding of Messrs. Frank and Bennett is confirmed by Richard Bauer, who states in his affidavit that –

The relationship established by and the duties and responsibilities described in the foregoing paragraph [paragraph 1.1 of the Construction Management Agreement] express the standard commercial relationship that exists between an owner and an agency construction manager not-at-risk.

Lastly, the course of conduct of the parties does not indicate a fiduciary relationship was contemplated by the parties. As Richard Bauer details:

Petra's duties and responsibilities were limited by the terms and conditions of the Construction Management Agreement. For instance, Petra's scope of services under the Construction Management Agreement did not include acting as the City's agent with regard to the architects. Rather, Petra's responsibility was to "consult and coordinate with the architect as needed." *See* Construction Management Agreement at 3.3. In addition, Petra did not have any inspection or testing responsibilities. Petra's duty was to observe the Work of the contractors hired directly by the City. Further, I have concluded from my review of the affidavits and legal memoranda filed by Meridian that the City is attempting to greatly expand the duties and responsibilities Petra undertook as an agency construction manager not-at-risk. Importantly, Petra was only required to act on the City's behalf with regard to the construction contracts.<sup>53</sup>

Therefore, the City is attempting to over-simplify this case by repeatedly claiming that a fiduciary relationship existed. At a minimum, this is a factual issue. And, for purposes of punitive damages, the weight of the evidence suggests that not only is the nature of the parties' relationship in this case a matter of dispute, but that the dispute is immaterial. Petra did not breach its duty to the City, however that duty is described.

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<sup>52</sup> Affidavit of Jerald S. Frank dated September 13, 2010 at ¶ 41; Affidavit of Eugene R. Bennett dated September 13, 2010 at ¶ 89. Affidavit of Richard Bauer dated September 17, 2010 at ¶¶ 6 and 7.

<sup>53</sup> Affidavit of Richard Bauer dated September 17, 2010 at ¶¶ 6 and 7.

### 3. CONCLUSION

As set forth above, the City's Motion fails to establish that Petra breached the Construction Management Agreement, or even if it did, that any of the breaches are material. Petra substantially performed under the Construction Management Agreement and under Idaho law. Consequently, the City cannot be excused from performing its obligations under the contract. Moreover, the City has waived these claims through its conduct. At a minimum, there are issues of material fact. Petra respectfully requests that the Court deny City's Motion for Partial Summary Judgment.

DATED: September 20, 2010.

**COSHO HUMPHREY, LLP**

By: 

THOMAS G. WALKER

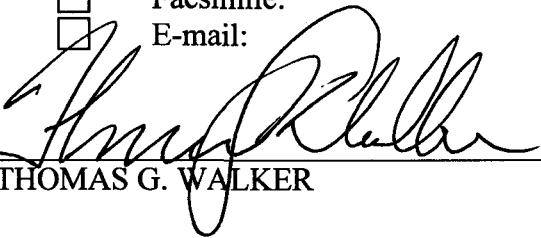
Attorneys for Defendant/Counterclaimant

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 20<sup>th</sup> day of September, 2010, a true and correct copy of the  
within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

<input type="checkbox"/>	U.S. Mail
<input checked="" type="checkbox"/>	Hand Delivery
<input type="checkbox"/>	Overnight Courier
<input type="checkbox"/>	Facsimile:
<input type="checkbox"/>	E-mail:

  
\_\_\_\_\_  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED PM 4:25

SEP 20 2010

J. DAVID NAVARRO, Clerk  
By KATHY BIEHL  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
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Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant.

Case No. CV OC 0907257

**AFFIDAVIT OF THOMAS COUGHLIN  
DATED SEPTEMBER 20, 2010 IN  
OPPOSITION TO THE CITY OF  
MERIDIAN'S MOTION FOR  
SUMMARY JUDGMENT AND  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT RE: LIABILITY**

STATE OF IDAHO )  
 ) ss.  
County of Ada )

1. I, Thomas Coughlin, being first duly sworn upon oath, depose and state:

2. I make this Affidavit based upon my own personal knowledge and I am competent to testify to the facts set forth below if called as a witness.

3. I have more than 26 years of experience in the construction industry.

4. During times relevant to this case I was employed by Petra Incorporated ("Petra").

5. I served as a project engineer on the new Meridian City Hall project ("Project").

6. I am one of the custodians of Petra's business records.

7. The documents referred to herein are true, correct and complete copies of the documents in Petra's files or documents produced by the City of Meridian ("City" or "Meridian") during the course of this litigation, which files and documents are kept in the course of Petra's regularly conducted business activity. It is Petra's regular practice to make or keep such documents.

8. I have reviewed the allegations contained in the City's *Motion for Partial Summary Judgment Re: Liability*, as well as and the supporting affidavits and their exhibits.

9. I particularly note the allegations regarding Rule Steel on pages 7 through 9 of the City's *Memorandum*.

10. I have personal knowledge of all relevant events with regard to the Rule Steel issues from December 13, 2007 onwards and I am the custodian of records generated prior to this date during the course of Petra's regularly conducted business activity.

11. Rule Steel did request time extensions with each ASI quoted.

12. Steven J. Amento refers to two versions of Change Order No. 1 and an apparent discrepancy between them regarding time extension. See Exh. 1, Exh. 2.

13. The typical procedure pursuant to our agreement with Keith Watts was to have each change order approved by the contractor, architect, and construction manager (Petra) prior to the City's final approval and payment.

14. This change order was handled differently because Keith Watts had designed/redesigned the approval signature sheet used for change orders during this period time.

15. In this instance the new change order approval sheet (Exhibit 1) was forwarded to Petra after it had been signed on behalf of the City.

16. The change order was then forwarded to Rule Steel, who added the notation "27" for added calendar days and initialed it "RA." See Exhibit 2.

17. Then I, on behalf of the City deleted the "27" and added "TBD" in the time extension area. See Exhibit 2.

18. This fully executed form, Exhibit 2, was then sent to the City. Keith Watts was informed that the time extension issue with Rule Steel was in flux and still needed to be resolved. This Change Order, Exhibit 2, was approved by the City.

19. I never entertained any thought of concealing any information from the City. On multiple occasions, I provided all relevant information to Mr. Watts and kept him and other representatives of the City fully informed.

20. I informed Mr. Watts, the City's authorized representative, on multiple occasions regarding all relevant issues concerning the Rule Steel delays and liquidated damages negotiations. See Exh. 3-8, 10, 11, 12.

21. Mr. Watts instructed me that Petra should move forward with its best recommendation regarding the Rule Steel matter. See Exh. 6.

22. I provided all relevant information to Mr. Watts prior to the drafting and approval of Change Order No. 3, which contained the liquidated damage settlement Petra had negotiated with Rule Steel on behalf of the City. See Exh. 3-8, 10, 11, 12.

23. For the City representatives to now claim that they were unaware of the Rule Steel change orders and the changes to the substantial completion date is not supported by any facts considering the amount of information I provided to Keith Watts prior to receiving the City's approval of the liquidated damage settlement Change Order No. 3. See Exhibit 13.

24. Petra was in daily contact with Rule Steel regarding production and erection issues and I kept the City's representative fully informed of all developments.

25. Rule Steel was assessed liquidated damages based on Petra's recommendation as reviewed and approved by the City's representatives in Change Order No. 3. See Exhibit 13.

26. The delays experienced in the fabrication and erection of the steel were not solely Rule Steel's fault. Design changes detailed in multiple ASIs and RFIs included in the change orders also impacted Rule Steel's fabrication and erection schedule.

27. Rule Steel submitted requests for time extensions with the various ASI's and RFI's.

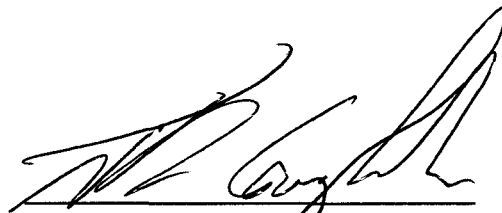
28. Regarding the City's allegations that Petra did not correctly apply Section 8.3.1 of the AIA A201/CMA – 1992 to the Rule Steel analysis, the City's assertions demonstrate that neither Mr. Amento nor the City's representatives understand how the "float" works in this situation.

29. The 30-day float that Amento refers to is not for each contractor. There is a 30-day float for the Project as a whole. If there was a 30 day float for each contractor, the Project would have never been finished.

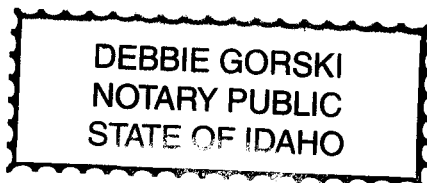
30. The 30-day float had already been consumed by the contaminated and unsuitable soil and design issues related to raising the building.


31. The float provision in Section 8.3.1 was therefore not relevant to the Rule Steel situation.

32. Petra sought all allowed liquidated damages and kept the City's representatives fully informed regarding all delays.

  
THOMAS R. COUGHLIN

SUBSCRIBED AND SWORN to before me this 20<sup>th</sup> day of September, 2010.



  
Notary Public for Idaho  
Residing at Boise, Idaho  
My commission expires: 7-5-2012



DATED: September 20, 2010

COSHO HUMPHREY, LLP

By:

THOMAS G. WALKER

Attorneys for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20<sup>th</sup> day of September, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Overnight Courier
- ☐ Facsimile
- ☐ E-mail:

THOMAS G. WALKER

CITY OF MERIDIAN  
33 EAST IDAHO  
MERIDIAN, ID 83642

CHANGE ORDER NO. 1
PROJECT NO.
DATE: 12-14-07
EFFECTIVE DATE: 10-30-07

### CONTRACT CHANGE ORDER

CONTRACTOR: RULE STEEL	
PROJECT: STEEL AND STEEL ERECTION	
The Contractor is hereby directed to make the following changes from the Contract Documents and Plans.	
Description: Additional structural requirements per ASI's #7, 8, 18, 19, 23.	
Reason for Change Order: Redesign by Architects	
Attachments: Architect's Supplemental Instructions #7, 8, 18, 19 & 23.	
<b>CHANGE IN CONTRACT PRICE:</b>	<b>CHANGE IN CONTRACT TIMES:</b>
Original Contract Price \$ 1,874,000.00	Original Contract Times:
Net changes form previous Change Orders No. ___ to ___ \$0.00	Net changes form previous Change Orders No. ___ to ___ (calendar days)
Contract Price Prior to this Change Order: \$1,847,000.00	Contract Times prior to this Change Order: (calendar days)
Net Increase (decrease) of this Change Order: \$35,766.00	Net Increase (decrease) of this Change Order: (calendar days) N/A
Contract Price with all Approved Change Orders: \$1,882,766.00	Contract Times with all Approved Change Orders: (calendar days)
RECOMMENDED: (Construction Manager)	APPROVED: (CITY PURCHASING AGENT)
By: Date:	By: Keith Watts Date: 12-14-07
ACCEPTED: (Contractor)	ATTEST: approved by City Council
By: Date:	By: City Clerk, Will Berg Jr. Date: 12-18-07 MB
APPROVED: (CITY) - Tammy de Weerd	ATTEST: Will Berg Jr.
By: Mayor Tammy de Weerd Date: 12-18-07	By: City Clerk, Will Berg Jr. Date: 12-18-07

EXHIBIT

1

006411 101719

JAN 07 2008

CITY OF MERIDIAN  
33 EAST IDAHO  
MERIDIAN, ID 83642

CHANGE ORDER NO.	1
PROJECT NO.	
DATE:	12-14-07
EFFECTIVE DATE:	10-30-07

## CONTRACT CHANGE ORDER

CONTRACTOR: RULE STEEL	
PROJECT: STEEL AND STEEL ERECTION	
The Contractor is hereby directed to make the following changes from the Contract Documents and Plans.	
Description: Additional structural requirements per ASI's #7, 8, 18, 19, 23.	
Reason for Change Order: Redesign by Architects	
Attachments: Architect's Supplemental Instructions #7, 8, 18, 19 & 23.	
<b>CHANGE IN CONTRACT PRICE:</b>	<b>CHANGE IN CONTRACT TIMES:</b>
Original Contract Price \$ 1,874,000.00	Original Contract Times:
Net changes form previous Change Orders No. ___ to ___ \$0.00	Net changes form previous Change Orders No. ___ to ___ (calendar days)
Contract Price Prior to this Change Order:  \$1,847,000.00	Contract Times prior to this Change Order: (calendar days)
Net increase (decrease) of this Change Order: \$35,766.00 ✓	Net Increase (decrease) of this Change Order: (calendar days) N/A 21 RA TO BS DETERMINED
Contract Price with all Approved Change Orders: \$1,882,766.00	Contract Times with all Approved Change Orders: (calendar days)
RECOMMENDED: (Construction Manager) By: <i>[Signature]</i> Date: 12/27/07	APPROVED: (CITY PURCHASING AGENT) By: Keith Watts Date: 12-14-07
ACCEPTED: (Contractor) By: <i>[Signature]</i> Date: 1/3/08	ATTEST: approved by City Council By: City Clerk, Will Berg Jr. Date: 12-18-07 <i>[Signature]</i>
APPROVED: (CITY) - By: Tammy de Weerd Date: 12-18-07	ATTEST: By: City Clerk, Will Berg Jr. Date: 12-18-07

EXHIBIT

2

Petra53014  
006412

## Tom Coughlin

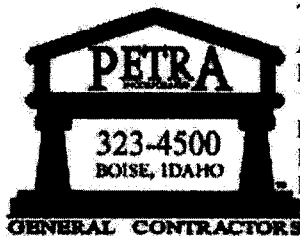
---

**From:** Tom Coughlin  
**Sent:** Wednesday, March 12, 2008 2:32 PM  
**To:** 'Keith Watts'  
**Subject:** Rule Time Extension & Liquidated Damages  
**Attachments:** COM Memo- Rule Time Ext 031208.doc

Keith

Attached is a draft of a memo to you addressing the Rule Steel time extension & liquidated damages issue. I would like to discuss this with you and get the cities input prior to approaching Rule with a proposed settlement for these issues.

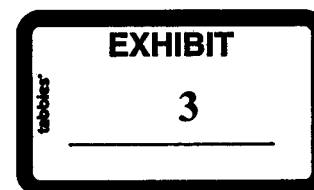
Let me know.  
Thanks  
Tom Coughlin



Tom Coughlin  
Project Manager  
Petra, Inc.  
1097 N. Rosario  
Meridian, ID 83642  
Phone: (208) 323-4500 Fax: (208) 323-4507  
E-Mail: tcoughlin@petrainc.net

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3/22/2008



*MCH*  
*7/27/08*  
*Owner*  
Petra62872  
006413



1097 N. Rosario Street, Meridian, ID 83642 Phone (208)323-4500 Fax (208)323-4507

Date: March 12, 2008

To: Keith Watts, Purchasing Manger, City Of Meridian

From: Tom Coughlin, Project Manager

Re: Rule Steel – Time Extension & Liquidated Damages

In an attempt to address the time extensions that Rule Steel has requested for various ASI's and RFI's issued to-date Petra Inc. has reviewed the requests and the actual scenario involving the progress of their work.

Petra had previously informed Rule Steel that they would be assessed liquidated damages starting on 11/26/07 if the entire structural steel scope of work was not completed by that date. It is Petra's opinion that the steel scope of work was not substantial complete until 2/08/08. This date represents the date that Petra feels the structural steel was completed to a point so as not to impede any of critical path follow-on work required to complete and/or dry-in the building. This period amounts to 75 calendar days. The period of time that Rule Steel would be assessed liquidated damages for would be the 75 days minus any time extensions granted for the various ASI's & RFI's that have impacted the structural steel scope of work.

Rule Steel had previously requested a total of 27 days for the items that were included in Rule's CO#01. This request was held in abeyance pending the completion of the work.

For the items previously included in CO #01:

- ASI-7 Lower Floor Structure at 1<sup>st</sup> Floor– Time requested 5 days. OK to recommend to the City.
- ASI-8 Steel Connection Modifications – Time requested 10 days. OK to recommend to the City.
- ASI-18 Add Camber & Revise Moment Connections – Time requested 5 days. OK to recommend to the City.
- ASI-19 Connection Fix for Bsmt Wall to Low – Time requested 2 days. Not recommended, didn't impact the progress of the work.
- ASI-23 Stair Tower Support Steel – Time requested 5 days. OK to recommend to the City.

This is totals to 25 of the 27 work days requested.

For the items pending change order submittal:

- ASI-13 Elevator Tube Upgrade – Time requested 10 days. Not recommended, this work was done after the substantial completion date.
- ASI-52 Elevator Penthouse Beams – Time requested 10 days. Would recommend 5 days.
- ASI-54 Roof Elevation & Slope @ CMU Wall – Time requested 3 days. OK to recommend.
- RFI-73 Sun Shade Connection – Time requested 3 days. Not recommended, did not impact the progress of the work.
- RFI-74 Angle Clips for Support of Wall – Time requested 3 days. Not recommended, did not impact the progress of the work. As of Friday, 3/7/07 these clips had not been installed.
- Bent Plate @Grid H (Included with RFI-74) – Add bent plate, shop drawings marked incorrectly. Time requested 5 days. OK to recommend to the City.

- RFI-93 Relief Angle @ Stair Towers – Time requested 5 days. Not recommended, did not impact the work. This was for furnishing only.
- RFI-94 Furnish and install two chiller beams. Time requested 5 days. Not recommended, did not impact the work. This was issued and accomplished after the base building work on the critical path was completed.

The time for these pending changes that Petra can recommend to the City would be 13 work days.

The total time extension, considering both the CO#01 items and the new items, that Petra would propose to recommend is 38 days work days, which translates to 52 calendar days. The 52 calendar days represent a time extension that Petra feels would be fair and responsible to both Rule Steel and the City. Based on this Rule Steel would still be liable for liquidated damages for a period of 23 calendar days based on a substantial completion date for their work of 2/8/08. The total cost for these 23 days at \$500/Day would be \$ 11,500.

Please review this scenario and let me know if this line of reasoning is acceptable to the City. If this is acceptable Petra will propose this to Rule as settlement of the matter of the schedule delays and the time extensions requested for the various delays. Currently Petra has not approached Rule with proposal regarding their time extension requests.

**From:** Keith Watts  
**Sent:** Wednesday, March 12, 2008 06:22 PM  
**To:** Tom Coughlin  
**Subject:** RE: Rule Time Extension & Liquidated Damages  
**Attachments:** image002.jpg

Tom, I will discuss and get back to you. Thanks,

Keith Watts

Purchasing Agent  
City of Meridian  
33 East Idaho Avenue  
Meridian, ID 83642

Ph. 208-888-4433 x207  
Fax: 208-887-4813

From: Tom Coughlin [mailto:tcoughlin@petrainc.net]  
Sent: Wednesday, March 12, 2008 2:32 PM  
To: Keith Watts  
Subject: Rule Time Extension & Liquidated Damages

Keith

Attached is a draft of a memo to you addressing the Rule Steel time extension & liquidated damages issue. I would like to discuss this with you and get the cities input prior to approaching Rule with a proposed settlement for these issues.

Let me know.  
Thanks  
Tom Coughlin

Tom Coughlin  
Project Manager  
Petra, Inc.  
1097 N. Rosario  
Meridian, ID 83642  
Phone: (208) 323-4500 Fax: (208) 323-4507  
E-Mail: tcoughlin@petrainc.net

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**From:** Tom Coughlin  
**Sent:** Tuesday, March 18, 2008 12:46 PM  
**To:** Keith Watts  
**CC:** Gene Bennett; Jon Anderson  
**Subject:** FW: Rule Time Extension & Liquidated Damages  
**Attachments:** image001.jpg; COM Memo- Rule Time Ext 031208.doc

Keith

Any feedback on the Rule Steel Time Extension question? I would like to get this all wrap up in a final change order if possible.

Let me know if you have any questions.

Tom C

Tom Coughlin  
Project Manager  
Petra, Inc.  
1097 N. Rosario  
Meridian, ID 83642  
Phone: (208) 323-4500 Fax: (208) 323-4507  
E-Mail: tcoughlin@petrainc.net

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**From:** Tom Coughlin  
**Sent:** Wednesday, March 12, 2008 2:32 PM  
**To:** 'Keith Watts'  
**Subject:** Rule Time Extension & Liquidated Damages

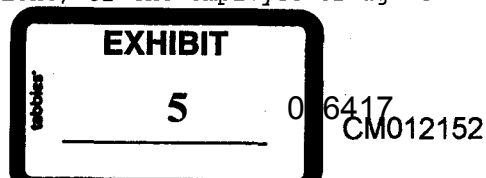
Keith

Attached is a draft of a memo to you addressing the Rule Steel time extension & liquidated damages issue. I would like to discuss this with you and get the cities input prior to approaching Rule with a proposed settlement for these issues.

Let me know.  
Thanks  
Tom Coughlin

Tom Coughlin  
Project Manager  
Petra, Inc.  
1097 N. Rosario  
Meridian, ID 83642  
Phone: (208) 323-4500 Fax: (208) 323-4507  
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**From:** Keith Watts  
**Sent:** Monday, March 24, 2008 02:43 PM  
**To:** Tom Coughlin  
**CC:** 'Gene Bennett'; Jon Anderson  
**Subject:** Rule Steel

Tom, the Council stated today that Petra should move forward with their best recommendation as the Council is relying on the Construction Manager to look out for its rights/best interests in the contracts.

I would however, like clarification on the issue.

The contract has a Substantial Completion Date of 10/5/07. Why do we not assess LD's until 11/26/07? I am in possession of the letter Petra sent to Rule Steel dated November 1, 2007. In this letter Petra states that the erection start date is June 4, 2007. The contract states a start date of Substantial Completion of July 16, 2007 and finishing October 5, 2007. This is pretty confusing to me. I read this as START DATE of 7/16/07 and completion of 10/5/07. Am I wrong? With 4 weeks delay due to soil Start date would be 7/13/07 and completion of 11/2/07. If this is correct we need to create CHANGE ORDER #2 for the extension in time to make it official. I need the Contract Documents to match what is agreed upon not just memos. I'm still unclear why we did not assess LD's until 11/26.

Can you tell me what day Rule actually started?

If after July 16th how many days were due to the soil?

Am I correct by stating Substantial Completion was achieved on 2/8/08?

Change Order #1 did not give them any time extension. Someone (Petra?) wrote in To Be Determined. Was there any correspondence with Rule to determine this?

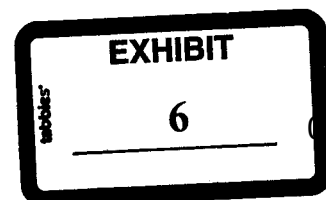
I show 10/5/07 to 2/8/08 to be 126 Calendar Days. The memo from you dated 3/12/08 has a recommendation of relief for 33 days. That leaves 93 days. I need to know where the difference of 70 days is.

On November

Keith Watts

Purchasing Agent  
City of Meridian  
33 East Idaho Avenue  
Meridian, ID 83642

Ph. 208-888-4433 x207  
Fax: 208-887-4813



006419  
CM012819

**Tom Coughlin**

---

**From:** Tom Coughlin  
**Sent:** Thursday, April 24, 2008 1:27 PM  
**To:** 'Keith Watts'  
**Cc:** Gene Bennett; Jon Anderson  
**Subject:** Rule Steel Schedule Issues

Keith

In response to your questions I have reviewed the Rule Steel issues in an effort to clarify the situation regarding liquidated damages and a time extension.

Rule Steel's contract has a start date of July 16<sup>th</sup>, 2007 and a Substantial Completion Date of October 5, 2007. These dates take into account the delay in the start due to the soil issues. Rule Steel actually started on July 30, 2007 and Substantial Completion was achieved on February 8, 2008. Change Order No 1 did not include any time extension since at the time the change order was submitted an equitable extension could not be determined. That is why it was noted that the change in contract time was to be determined.

The November 26<sup>th</sup> date mentioned in Petra's November 1<sup>st</sup> letter was an estimated contract completion date based on adjusting for weather delays and a time extension for the change order work included in CO#01. As of the November 1<sup>st</sup> date the project had experienced 12 weather days and Rule Steel had requested a time extension of 27 work days for the ASI/change order work include in their CO#01. Converting the work days to calendar days would result in an extension of 53 days. This is how the November 25<sup>th</sup> completion and the November 26<sup>th</sup> start of liquidated damages dates were generated. Since November 1<sup>st</sup> Rule Steel has requested an additional 44 days for the pending change items that would be included in CO#02 to Rule Steel. LCA is currently reviewing the scope of the changes included in CO#02. Of the 44 days requested, Petra currently is of the opinion Rule is due an extension of approximately 13 work days (17 calendar days). The actual length of the time extension will need to be finalized with Rule. If the schedule is extended another 17 calendar days plus the 16 calendar days lost to weather during that period it totals 33 calendar days and would push the completion date out from 11/25 to 12/28/07. This leaves a total of 42 calendar days between the proposed contract completion date of 12/28 and the actual substantial completion of date of 2/8/08. At a rate of \$500/Day this would amount to liquidated damages in the amount of \$21,000 being assessed against Rule Steel.

On the first go around I had included the time allotted for the CO#01 items into the time period after 11/26 when it was already figured into the prior period that pushed to the date out to 11/26, this accounts for the difference in the proposed end dates.

Let me know if this clarifies the situation for you. If this meets with your approval Petra would like to proceed with negotiating a settlement with Rule Steel on the time extension they would be due and the resulting liquidated damages. After Rule and Petra have reached agreement on the matter we would submit the proposed settlement to the City for approval and draft the appropriate change order to closeout the contract.

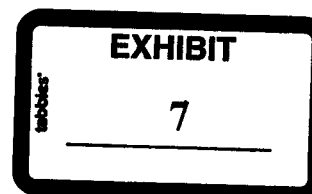
Please let me know as soon as possible if this meets with your approval and we can proceed. If you have any further questions please contact me.

Thanks  
Tom Coughlin



Tom Coughlin  
Project Manager  
Petra, Inc.  
1097 N. Rosario  
Meridian, ID 83642  
Phone: (208) 323-4500 Fax: (208) 323-4507  
E-Mail: tcoughlin@petrainc.net

4/30/2008



*Handwritten:* MCA CITY  
Petra62958  
006420

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## GENERAL CONTRACTORS & CONSTRUCTION MANAGEMENT

June 9, 2008

Via E-Mail: [snorquist@westernsteelmg.com](mailto:snorquist@westernsteelmg.com), [ron\\_allen@rulesteel.com](mailto:ron_allen@rulesteel.com)

Mr. Steve Norquist & Mr. Ron Allen  
Rule Steel Tanks, Inc.  
21986 Middleton Rd.  
Caldwell, ID 83605

RE: Time Extension Request & Liquidated Damages  
Meridian City Hall Steel Fabrication & Erection

Gentlemen:

Following additional review of Rule Steel's request for a time extension and the assessment of the liquidated damages on the project with the City of Meridian Petra has prepared the following updated synopsis of the timeline of events concerning this issue.

Rule Steel's contract indicated a start date of July 16<sup>th</sup>, 2007 and a substantial completion date of October 5<sup>th</sup>, 2007. Rule Steel actually started erection on July 30<sup>th</sup>, 2007 and in Petra's opinion obtained substantial completion on February 8<sup>th</sup>, 2008. The substantial completion date is the date that Petra feels the structural steel was completed to a point so as not to impede any critical path follow-on work required to complete and/or dry-in the building. Work on the project by Rule Steel did continue after this date.

Rule Steel had previously been informed that liquidated damages would be assessed starting November 26<sup>th</sup>, 2007 if the entire structural steel scope of work was not completed prior to the 26<sup>th</sup>. The November 26<sup>th</sup> date stated in Petra's November 1<sup>st</sup> letter was an estimated contract completion date based on adjustments for weather days and a time extension for the change order work included in CO#01. As of the November 1<sup>st</sup> date the project had experienced 12 weather days and Rule Steel had requested a time extension of 27 work days for the ASI/change order work included in CO#01. Converting the 39 work days to calendar days would result in an extension of 53 calendar days. Adding the 53 days to the contractual completion date of October 5<sup>th</sup> results in a projected completion date of November 25<sup>th</sup>, 2007.

Since November 1<sup>st</sup> Rule Steel has requested an additional 44 days for the pending change items included in proposed change order number PCO#02. Outlined below is a summary of the time extensions requested and recommended for the items included in both CO#01 and CO#02:

For the items included in CO #01:

- ASI-7 Lower Floor Structure at 1<sup>st</sup> Floor– Time requested 5 days. OK to recommend to the City.
- ASI-8 Steel Connection Modifications – Time requested 10 days. OK to recommend to the City.
- ASI-18 Add Camber & Revise Moment Connections – Time requested 5 days. OK to recommend to the City.
- ASI-19 Connection Fix for Basement Wall to Low – Time requested 2 days. Not recommended, didn't impact the progress of the work.
- ASI-23 Stair Tower Support Steel – Time requested 5 days. OK to recommend to the City.

This totals to 25 of the 27 work days requested.

For the items included in CO#02:

- ASI-13 Elevator Tube Upgrade – Time requested 10 days. Not recommended, this work was done after the substantial completion date.
- ASI-52 Elevator Penthouse Beams – Time requested 10 days. Recommend 5 days.
- ASI-54 Roof Elevation & Slope @ CMU Wall – Time requested 3 days. Recommend 3 days.
- RFI-73 Sun Shade Connection – Time requested 3 days. Not recommended, did not impact the progress of the work.
- RFI-74 Angle Clips for Support of Wall – Time requested 3 days. Not recommended, this did not impact the progress of the work. As of Friday, 3/7/07 these clips had not been installed.
- Bent Plate @Grid H (Included with RFI-74) – Add bent plate, shop drawings marked incorrectly. Time requested 5 days. Recommended 5 days to the City.
- RFI-93 Relief Angle @ Stair Towers – Time requested 5 days. Not recommended, did not impact the work. This was for furnishing only.
- RFI-94 Furnish and install two chiller beams. Time requested 5 days. Not recommended, did not impact the work. This was issued and accomplished after the base building work on the critical path was completed.

This totals 13 of the 44 work days requested.

Converting the 13 work days recommended to calendar days results in an extension of 17 days. Extending the schedule another 17 calendar days plus the 16 days lost to weather during the period would result in an additional extension of 33 calendar days and would push the contract completion date out from November 25 to December 28, 2007. This leaves a total of 42 calendar days between the proposed contract completion date of December 28, 2007 and the actual substantial completion date of February 8, 2008. Per the contract liquidated damages are assessed at a rate of \$500/day. Based on a period of 42 days at a rate of \$500/day this would amount to liquidated damages in the amount of \$21,000 being assessed against Rule Steel for delays in completing your scope of work for the project.

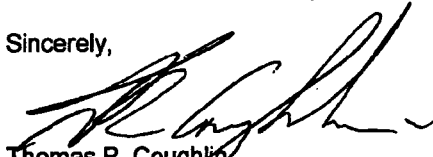
In response to the additional questions you posed in your March 25<sup>th</sup> email:

1. It is the City of Meridians intent to impose liquidated damages.
2. The weather delays have been factored into the extensions.
3. No time extensions have been considered for the separately for the moment field welds. This is not a changed condition and the City does not bare the responsible for the time required. In addition the additional time extensions proposed would more than offset this item.
4. ASI-52 Elevator Penthouse Beams – In response to your request for a total of 10 additional days Petra feels the 5 days currently recommended are fair, the additional five days requested have not been recommended.

Petra is proposing that a final change order be prepared based on the above synopsis as final settlement of the Meridian City Hall contract. The change order (CO#03) would extend the contract substantial completion date to December 28, 2007 and deduct the amount of the liquidated damages assessed, \$21,000, from the contract amount.

Please let me know as soon as possible if this meets with your approval and we can proceed with the submittal of the final change to the City of Meridian for approval. If you have any questions do not hesitate to contact me.

Sincerely,



Thomas R. Coughlin  
Project Manager

CC: Gene Bennett - Petra, Inc.  
Keith Watts-City of Meridian.

H:\Construction\Projects\2006\WestMeridian City Hall\Correspondence\Rule Steel 060906.doc



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Fax 208 585-2506  
[structural@rulesteel.com](mailto:structural@rulesteel.com)

August 21, 2008

Mr. Tom R. Coughlin  
Petra Construction  
1097 N. Rosario Place  
Meridian, ID 83642

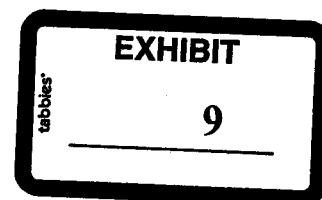
RE: Meridian City Hall

Dear Tom,

I write in response to your letter of June 9, 2008 concerning time extension request and liquidated damages for the Meridian City Hall. Our position on this is as follows.

You indicate a contract erection start date of 7/16/08 and an actual start date of erection of 7/30/08. This 7/30/08 date is accurate but the initial two week delay was of no cause by Rule Steel or its steel erection subcontractor, Boise Steel Erectors. Neither the required concrete/foundation work or masonry stair tower work was sufficiently completed by 7/16/08 to allow required access to initiate steel erection or to continue erection in an efficient manner. The required concrete/foundation progress and the need for all three masonry stair towers to be completed prior to the start of erection was discussed and agreed to in pre-construction meetings with Petra Incorporated. At weekly jobsite meetings I attended in June and July the progress of the concrete and masonry trades were updated and documented each week and there was clear agreement that erection could not begin until at the earliest 7/30/08 when steel shipments began. If the site would have been ready for erection to begin as agreed on 7/16/08 there would have been no reason for that not to occur. This is also supported by Boise Steel Erectors daily logs. Our position is Rule Steel should not be responsible for these 14 days.

In addition, we are still requesting the full 10 day extension required by ASI #52 in lieu of 5 days. This item caused several additional re-submittals to be provided and approved to determine the changes requested by the owner prior to the work being fabricated and completed.



006425  
PETRA88775



Your letter assesses 42 calendar days of delay. We are agreeable to 23 days (42 days less 19 days) per our position stated above and will accept a deductive change order for the amount \$11,500.00.

Please review these items and contact me as soon as it is convenient to meet and finalize this issue.

Thank you.

Steve Norquist  
Rule Steel

**From:** Keith Watts  
**Sent:** Thursday, November 20, 2008 07:32 AM  
**To:** Tom Coughlin  
**CC:** Gene Bennett  
**Subject:** RE: Rule Steel CO - MCH  
**Attachments:** image001.gif

I will need to take this to Council. Probably an Exec. Session.

Keith Watts

Purchasing Agent  
City of Meridian  
33 East Broadway Avenue  
Meridian, ID 83642

Ph. 208-888-4433  
Fax: 208-887-4813

From: Tom Coughlin [mailto:tcoughlin@petrainc.net]  
Sent: Thursday, November 20, 2008 7:42 AM  
To: Keith Watts  
Cc: Gene Bennett  
Subject: Rule Steel CO - MCH

Keith

Attached is a memo outlining Petra's recommendation concerning the issue of liquidated damages and time extension for Rule Steel.

I do not know if this is an issue that you can act on or if it is something you want to put in front of the council. Either way it is something we need to resolve in order to close things out. After you have had a chance to review the attached give me a call.

If this is acceptable I will prepare a change order to formalize this.

Let me know.

Thanks  
Tom Coughlin

Tom Coughlin  
Project Manager  
PETRA, Inc.  
1097 N Rosario St.  
Meridian, ID 83642  
P:208-323-4500  
C:208-919-8583  
F:208-323-4507  
tcoughlin@petrainc.net  
www.petrainc.net



**From:** Tom Coughlin  
**Sent:** Thursday, November 20, 2008 06:42 AM  
**To:** Keith Watts  
**CC:** Gene Bennett  
**Subject:** Rule Steel CO - MCH  
**Attachments:** image001.gif; COM Memo- Rule Time Ext 111908.doc

Keith

Attached is a memo outlining Petra's recommendation concerning the issue of liquidated damages and time extension for Rule Steel.

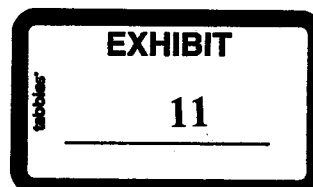
I do not know if this is an issue that you can act on or if it is something you want to put in front of the council. Either way it is something we need to resolve in order to close things out. After you have had a chance to review the attached give me a call.

If this is acceptable I will prepare a change order to formalize this.

Let me know.

Thanks  
Tom Coughlin

Tom Coughlin  
Project Manager  
PETRA, Inc.  
1097 N Rosario St.  
Meridian, ID 83642  
P:208-323-4500  
C:208-919-8583  
F:208-323-4507  
tcoughlin@petrainc.net  
www.petrainc.net



006428  
CM009185



1097 N. Rosario Street, Meridian, ID 83642 Phone (208)323-4500 Fax (208)323-4507

Date: November 19, 2008

To: Keith Watts, Purchasing Manger, City Of Meridian

From: Tom Coughlin, Project Manager

Re: Rule Steel – Time Extension & Liquidated Damages  
Meridian City Hall

As a result of discussions with Rule Steel concerning time extensions for additional work and the assessment of liquidated damages Petra has formulated a recommendation for a full settlement with Rule Steel on these issues. It is our recommendation that Rule Steel be granted a time extension of 97 calendar days and be assessed liquidated damages for a period of 28 calendar days in the amount of \$ 14,000. The methodology used to arrive at this recommendation is summarized below.

Rule Steel would be assessed with liquidated damages as a result of their failure to complete the contract work within the originally scheduled duration. However the originally scheduled duration has been impacted by the numerous changes to the project. Rule Steel has requested time extensions for the various ASI's and RFI's issued to-date. Petra Inc. has reviewed the requests and the actual scenarios involving the progress of their work and has prepared the following updated synopsis of the timeline of events concerning this issue.

Rule Steel's contract indicated a start date of July 16<sup>th</sup>, 2007 and a substantial completion date of October 5<sup>th</sup>, 2007. Rule Steel actually started erection on July 30<sup>th</sup>, 2007 and in Petra's opinion obtained substantial completion on February 8<sup>th</sup>, 2008. The substantial completion date is the date that Petra feels the structural steel was completed to a point so as not to impede any critical path follow-on work required to complete and/or dry-in the building. Work on the project by Rule Steel did continue after this date.

The delay in the start of the steel erection was the result of the work on the CMU stair towers not being completed to a point to allow the steel erection to proceed until July 30<sup>th</sup>. The 14 calendar days lost to due to this delay will need to be credit to the contract duration allowed for the steel erection. It should be noted that the delay was not the fault of the masonry contractor or another contractor but was due to the impact of the changes to the building design relating to the unsuitable material, raising the building and the addition of the basement.

Rule Steel had previously been informed that liquidated damages would be assessed starting November 26<sup>th</sup>, 2007 if the entire structural steel scope of work was not completed prior to the 26<sup>th</sup>. The November 26<sup>th</sup> date stated in Petra's November 1<sup>st</sup> letter was an estimated contract completion date based on adjustments for weather days and a time extension for the change order work included in CO#01. As of the November 1<sup>st</sup> date the project had experienced 12 weather days and Rule Steel had requested a time extension of 27 work days for the ASI/change order work included in CO#01. Converting the 39 work days to calendar days would result in an extension of 53 calendar days. Adding the 53 days to the contractual completion date of October 5<sup>th</sup> results in a projected completion date of November 25<sup>th</sup>, 2007.

Since November 1<sup>st</sup> Rule Steel has requested an additional 44 days for the pending change items included in proposed change order number PCO#02. Outlined below is a summary of the time extensions requested and recommended for the items included in both CO#01 and CO#02:

For the items included in CO #01 (Previously approved with the caveat that any time extension due would be determined at a later date):

- ASI-7 Lower Floor Structure at 1<sup>st</sup> Floor– Time requested 5 days. OK to recommend to the City.
- ASI-8 Steel Connection Modifications – Time requested 10 days. OK to recommend to the City.
- ASI-18 Add Camber & Revise Moment Connections – Time requested 5 days. OK to recommend to the City.
- ASI-19 Connection Fix for Basement Wall to Low – Time requested 2 days. Not recommended, didn't impact the progress of the work.
- ASI-23 Stair Tower Support Steel – Time requested 5 days. OK to recommend to the City.

This totals to 25 of the 27 work days requested.

For the items included in CO#02 (currently pending with Rule Steel):

- ASI-13 Elevator Tube Upgrade – Time requested 10 days. Not recommended, this work was done after the substantial completion date.
- ASI-52 Elevator Penthouse Beams – Time requested 10 days. Recommend 5 days.
- ASI-54 Roof Elevation & Slope @ CMU Wall – Time requested 3 days. Recommend 3 days.
- RFI-73 Sun Shade Connection – Time requested 3 days. Not recommended, did not impact the progress of the work.
- RFI-74 Angle Clips for Support of Wall – Time requested 3 days. Not recommended, this did not impact the progress of the work. As of Friday, 3/7/07 these clips had not been installed.
- Bent Plate @ Grid H (Included with RFI-74) – Add bent plate, shop drawings marked incorrectly. Time requested 5 days. Recommended 5 days to the City.
- RFI-93 Relief Angle @ Stair Towers – Time requested 5 days. Not recommended, did not impact the work. This was for furnishing only.
- RFI-94 Furnish and install two chiller beams. Time requested 5 days. Not recommended, did not impact the work. This was issued and accomplished after the base building work on the critical path was completed.

This totals 13 of the 44 work days requested.

Converting the 13 work days recommended to calendar days results in an extension of 17 days. Extending the schedule another 17 calendar days plus the 16 days lost to weather during the period would result in an additional extension of 33 calendar days and would push the contract completion date out from November 25 to December 28, 2007. Crediting Rule Steel with the 14 calendar days the start of erection was delayed would extend the completion date further to January 11, 2008.

The total time extension, considering both the CO#01, CO#02 items and the weather delays that Petra would recommend is 97 calendar days. The 97 calendar days represents a time extension that Petra feels would be fair and responsible to both Rule Steel and the City. Based on this Rule Steel would be liable for liquidated damages for a period of 28 calendar days based on the difference between the new proposed contractual completion date of January 11, 2008 and the actual substantial completion date of February 8, 2008. Per the contract liquidated damages are assessed at a rate of \$500/day. The total cost for these 28 days at \$500/Day would be \$ 14,000.

Please review this scenario and let me know if this line of reasoning is acceptable to the City. If this is acceptable Petra will propose this to Rule as settlement of the matter of the schedule delays and the time extensions requested for the various delays.

**From:** Tom Coughlin  
**Sent:** Monday, December 01, 2008 02:43 PM  
**To:** 'Keith Watts'  
**CC:** Gene Bennett; 'Kathy Wanner'  
**Subject:** FW: Payments & Change Orders - MCH  
**Attachments:** image001.gif

Keith

What is the status for payments for October, including Petra's? I have been getting calls from contractors.

What needs to happen to get \$5,842 that is outstanding from the July 08 billing resolved?

On the change order side you should have 8 change orders in your possession for approval plus the Rule Steel issue which needs your OK. The Rule issue will generate one or two additional change orders. I am working on three additional change orders that involve work older than October. I should have all three of these to LCA this week.

When can we set a time to sit down and review the Petra change order request with your self and Ted? We would like to get this settle as soon as possible. Currently we are working for free.

We also need to get a contract setup for the East Parking Lot. We had sent you a proposal previously.

Can you let me know the status on each of these items?

Thanks  
Tom Coughlin

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Project Manager  
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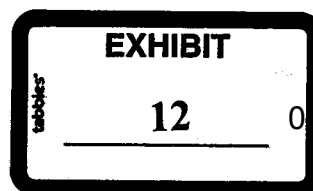
**From:** Tom Coughlin  
**Sent:** Saturday, November 22, 2008 12:27 PM  
**To:** 'Keith Watts'  
**Cc:** 'Kathy Wanner'; Gene Bennett  
**Subject:** FW: Payments & Change Orders - MCH

Keith

Any news on the Oct payments? How about the July payment?

Will you and Ted have time to sit down and discuss the Petra change order on Tuesday, 11/25?

Thanks  
Tom C



Petra80594

Tom Coughlin  
Project Manager  
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From: Tom Coughlin  
Sent: Wednesday, November 19, 2008 2:13 PM  
To: 'Keith Watts'  
Cc: 'Kathy Wanner'; Gene Bennett  
Subject: Payments & Change Orders - MCH

Keith

With Thanksgiving next week what is the timetable for payments of the October billing. I have not had any feedback or questions so I am assuming we are good to go on everything. Let me know if this is not the case.

The \$5,842 from the July billing is still outstanding, can we get that cut loose.

You should have 16 contractor change orders in your possession; this would include three being developed today.

Any more though on when we can sit down with you and Ted to review the Petra change order request? Gene and I are both available on Monday or Tuesday next week.

If you have any questions please call me.  
Thanks  
Tom

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CITY OF MERIDIAN  
33 EAST IDAHO  
MERIDIAN, ID 83642

CHANGE ORDER NO. 03
PROJECT NO. CH-06-001
DATE: 2/4/2009
EFFECTIVE DATE:

### CONTRACT CHANGE ORDER

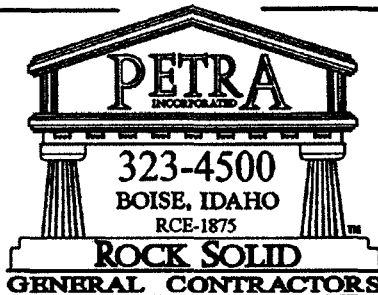
<b>CONTRACTOR: RULE STEEL</b>	
<b>PROJECT: MERIDIAN CITY HALL - Settlement of Liquidated Damages</b>	
<p>The Contractor is hereby directed to make the following changes from the Contract Documents and Plans.</p> <p>Description: Settlement of all issues related to liquidated damages and contractor requested time extension, painting back charges and remedial work on sunshade frames .</p> <p>ALL OTHER TERMS AND CONDITIONS REMAIN THE SAME.</p> <p>Reason for Change Order: Settlement of liquidated damages</p> <p>Attachments: Change order items description, dated 3/11/09, with contractor quotes</p>	
<b>CHANGE IN CONTRACT PRICE:</b>	<b>CHANGE IN CONTRACT TIMES:</b>
Original Contract Price \$1,847,000.00	Original Contract Times: Substantial Completion 10/5/07
Net changes form previous Change Orders No. 0 to 01 \$79,485.00	Net changes form previous Change Orders No. ___ to ___ (calendar days) None
Contract Price Prior to this Change Order: \$1,926,485.00	Contract Times prior to this Change Order: (calendar days or date) 10/5/2007
Net Increase (decrease) of this Change Order: (\$15,750.00)	Net Increase (decrease) of this Change Order: (calendar days or date) 97 Calendar Days
Contract Price with all Approved Change Orders: \$1,910,735.00	Contract Times with all Approved Change Orders: (calendar days) Substantial Completion 1/11/08
<b>RECOMMENDED: (CONSTRUCTION MANAGER)</b> Petra Inc. By: Thomas R. Coughlin Date: 3/19/09	<b>ACCEPTED: (CONTRACTOR)</b> Rule Steel By: Ron Allen Date: 3/19/09
<b>APPROVED: (CITY PURCHASING AGENT)</b> By: Keith Watts Date: 3-24-09	<b>COUNCIL APPROVAL</b> Date: 3-24-09
<b>APPROVED: (CITY)</b> By: Mayor Tammy de Weerd Date: 5-1-09	<b>ATTEST:</b> By: City Clerk, Jaycee Holman Date: 5-7-09

EXHIBIT

13

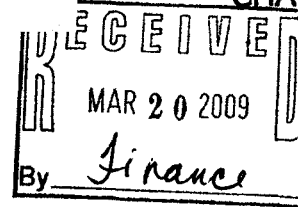
00640301682





CHANGE ORDER

No. 00003



1097 N. ROSARIO STREET • MERIDIAN, ID 83642 • PHONE: (208) 323-4500 • FAX: (208) 323-4507

**TITLE:** Settle of Outstanding Liq. Damages  
**PROJECT:** Meridian City Hall  
**TO:** Attn: Steve Norquist  
Rule Steel  
21986 Middleton Road  
Caldwell, ID 83605  
Phone: 208 585-3031 Fax: 208-585-2506

**DATE:** 2/4/2009  
**JOB:** 060675  
**CONTRACT NO:** 6

**RE:**                      **To:**                      **From:**                      **Number:**

**DESCRIPTION OF CHANGE**

\*\* All taxes are included in costs \*\*

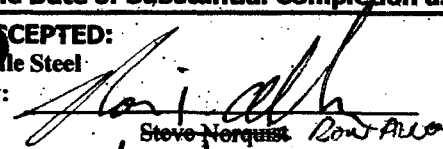
Item Description	Quantity	Units	Unit Price	Tax Rate	Tax Amount	Net Amount
00001 Settlement of all issued related to Contractors time extension requests and the assessment of liquidated damages for delays in completing the project by the contractual substantial completion date. Contractor is granted a time extension equal to 97 calendar days for the ASI's -7,8,13,18,23,52,54,RFI-74 Bent Plate and weather delays. The 97 calendar days would extend the contract substantial completion date from October 5, 2007 to January 11, 2008. The 97 calendar days is to be considered full and final settlement of all requests and claims for additional time and costs related to the project. This would include all requests related to weather delays and delays to the original scheduled start date. No time extensions are granted for ASI's 13 & 19, RFI's - 73, 74, 93 & 94. The Contractor was deemed Substantial Complete as of February 8, 2008. The difference between the new proposed contractual substantial completion date of January 11, 2008 and the actual substantial completion date of February 8, 2008 is 28 calendar days.	1.000	Is	(\$14,000.00	0.00%	\$0.00	(\$14,000.00)

**Unit Cost:** (\$15,750.00)  
**Unit Tax:** \$0.00  
**Lump Sum:** \$0.00  
**Lump Tax:** \$0.00  
**0.0% GC markup:** \$0.00  
**Total:** (\$15,750.00)

The Original Contract Sum was ..... \$1,847,000.00  
Net Change by Previously Authorized Requests and Changes ..... \$79,485.00  
The Contract Sum Prior to This Change Order was ..... \$1,926,485.00  
The Contract Sum Will be Decreased ..... (\$15,750.00)  
The New Contract Sum Including This Change Order ..... \$1,910,735.00  
The Contract Time Will be Increased ..... 97 days  
The Date of Substantial Completion as of this Change Order Therefore is ..... 2/11/08

**ACCEPTED:**

Rule Steel

By:   
Steve Norquist      Ron Allen

Date: 3/19/09

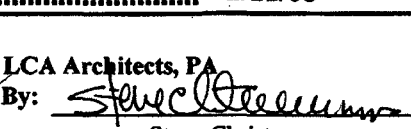
Expedition ©

Petra Incorporated

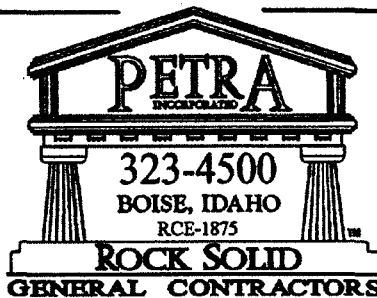
By:   
Tom Coughlin

Date: 3/19/08

LCA Architects, PA

By:   
Steve Christensen

Date: 3.13.09



CHANGE ORDER  
No. 00003

1097 N. ROSARIO STREET • MERIDIAN, ID 83642 • PHONE: (208) 323-4500 • FAX: (208) 323-4507

**TITLE:** Settle of Outstanding Liq. Damages  
**PROJECT:** Meridian City Hall  
**TO:** Attn: Steve Norquist  
Rule Steel  
21986 Middleton Road  
Caldwell, ID 83605  
Phone: 208 585-3031 Fax: 208-585-2506

**DATE:** 2/4/2009  
**JOB:** 060675  
**CONTRACT NO:** 6

**RE: To: From: Number:**

**DESCRIPTION OF CHANGE**

The Contractor is to be assessed liquidated damages for the 28 calendar days their work extended beyond the contractual substantial completion date. Per the contract liquidated damages are assessed at a rate of \$500/day. The total cost to be assessed against the contractor for the 28 calendar days at \$500/Day is \$14,000.

For further details reference attached Petra memo to Keith Watts, City of Meridian, dated 11/19/08; Re: Rule Steel - Time Extension & Liquidated Damages - Meridian City Hall.

0002	Sunshade Remedial Work - Labor and equipment to bond & smooth rolls marks and seams in sunshade steel members. Roll marks and seams are normal for structural steel unless specifically noted as architectural exposed. Rule Steel quote 8/28/08.	1.000	LS	\$2,943.00	0.00%	\$0.00	\$2,943.00
00003	Backcharge for additional painting work done on sunshade steel after misplaced clips had to be re-located. Commercial Painting Invoices #290275, dated 10/1/08 & #290277, dated 10/3/08	1.000	LS	(\$1,105.00)	0.00%	\$0.00	(\$1,105.00)
00004	Backcharge for removing sunshade panels installed & removed when it was determined that the clip location was wrong and had to be re-done. Custom Glass Invoice #12255, dated 9/30/08	1.000	LS	(\$1,000.00)	0.00%	\$0.00	(\$1,000.00)
00005	Backcharge for fan rental for stairway ventilation when stair handrail returns were be reworked. Tates Invoice 10/3	1.000	LS	(\$176.00)	0.00%	\$0.00	(\$176.00)

**Unit Cost:** (\$15,750.00)  
**Unit Tax:** \$0.00  
**Lump Sum:** \$0.00  
**Lump Tax:** \$0.00  
**0.0% GC markup:** \$0.00  
**Total:** (\$15,750.00)

The Original Contract Sum was .....	\$1,847,000.00
Net Change by Previously Authorized Requests and Changes .....	\$79,485.00
The Contract Sum Prior to This Change Order was .....	\$1,926,485.00
The Contract Sum Will be Decreased .....	(\$15,750.00)
The New Contract Sum Including This Change Order .....	\$1,910,735.00
The Contract Time Will be Increased .....	97 days
The Date of Substantial Completion as of this Change Order Therefore is .....	2/11/08

**ACCEPTED:**

Rule Steel

By: \_\_\_\_\_

Steve Norquist

Date: \_\_\_\_\_

Petra Incorporated

By: \_\_\_\_\_

Tom Coughlin

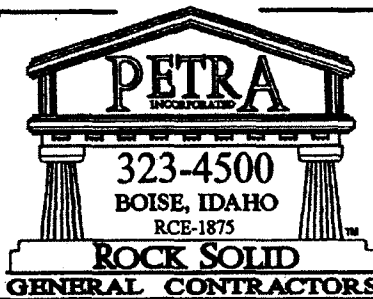
Date: \_\_\_\_\_

LCA Architects, PA

By: \_\_\_\_\_

Steve Christensen

Date: \_\_\_\_\_



CHANGE ORDER  
No. 00003

1097 N. ROSARIO STREET • MERIDIAN, ID 83642 • PHONE: (208) 323-4500 • FAX: (208) 323-4507

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**PROJECT:** Meridian City Hall  
**TO:** Attn: Steve Norquist  
Rule Steel  
21986 Middleton Road  
Caldwell, ID 83605  
Phone: 208 585-3031 Fax: 208-585-2506

**DATE:** 2/4/2009  
**JOB:** 060675  
**CONTRACT NO:** 6

**RE:** **To:** **From:** **Number:**

DESCRIPTION OF CHANGE				Quantity	Units	Unit Price	Rate	Tax Amount	Net Amount
00006 Backcharge for additional painting & prep work on the stair rail returns that were revised to meet Code. The additional work was done on Rule Steels request and behalf by Commercial Painting. Commercial Painting invoice #3391, dated 10/10/08				1.000	LS	(\$2,412.00)	0.00%	\$0.00	(\$2,412.00)

**Unit Cost:** (\$15,750.00)  
**Unit Tax:** \$0.00  
**Lump Sum:** \$0.00  
**Lump Tax:** \$0.00  
**0.0% GC markup:** \$0.00  
**Total:** (\$15,750.00)

**The Original Contract Sum was** ..... \$1,847,000.00  
**Net Change by Previously Authorized Requests and Changes** ..... \$79,485.00  
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**The Contract Time Will be Increased** ..... 97 days  
**The Date of Substantial Completion as of this Change Order Therefore is** ..... 2/11/08

**ACCEPTED:**

**Rule Steel**  
**By:** \_\_\_\_\_  
Steve Norquist

**Petra Incorporated**  
**By:** \_\_\_\_\_  
Tom Coughlin

**LCA Architects, PA**  
**By:** \_\_\_\_\_  
Steve Christensen

**Date:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**Date:** \_\_\_\_\_

Expedition ®

Page 3 of 3

0060001685

**MERIDIAN CITY HALL****PROJECT NO: CH-06-001****RULE STEEL - Phase 2 (06)****CHANGE ORDER NO 3**

03/11/09

**CHANGE ORDER ITEMS**

1	<p>Settlement of all issued related to Contractors time extension requests and the assessment of liquidated damages for delays in completing the project by the contractual substantial completion date.</p> <p>Contractor is granted a time extension equal to 97 calendar days for the ASI's -7,8,13,18,23,52,54,RFI-74 Bent Plate and weather delays. The 97 calendar days would extend the contract substantial completion date from October 5, 2007 to January 11, 2008. The 97 calendar days is to be considered full and final settlement of all requests and claims for additional time and costs related to the project. This would include all requests related to weather delays and delays to the original scheduled start date. No time extensions are granted for ASI's 13 &amp; 19, RFI's - 73, 74, 93 &amp; 94.</p> <p>The Contractor was deemed Substantial Complete as of February 8, 2008. The difference between the new proposed contractual substantial completion date of January 11, 2008 and the actual substantial completion date of February 8, 2008 is 28 calendar days.</p> <p>The Contractor is to be assessed liquidated damages for the 28 calendar days their work extended beyond the contractual substantial completion date. Per the contract liquidated damages are assessed at a rate of \$500/day. The total cost to be assessed against the contractor for the 28 calendar days at \$500/Day is \$14,000.</p> <p>For further details reference attached Petra memo to Keith Watts, City of Meridian, dated 11/19/08; Re: Rule Steel - Time Extension &amp; Liquidated Damages - Meridian City Hall.</p>	(14,000.00)
2	<p>Sunshade Remedial Work - Labor and equipment to bondo &amp; smooth rolls marks and seams in sunshade steel members. Roll marks and seams are normal for structural unless specifically noted as architectural exposed. Rule Steel quote 8/28/08.</p>	2,943.00
3	<p>Backcharge for additional painting work done on sunshade steel after misplaced clips had to be re-located. Commercial Painting invoices #290275, dated 10/1/08 &amp; #290277, dated 10/3/08</p>	(1,105.00)
4	<p>Backcharge for removing sunshade panels installed &amp; removed when it was determined that the clip location was wrong and had to be re-done. Custom Glass invoice #12255, dated 9/30/08</p>	(1,000.00)
5	<p>Backcharge for fan rental for stairway ventilation when stair handrail returns were be reworked. Tates invoice 10/3</p>	(176.00)
6	<p>Backcharge for additional painting &amp; prep work for the stair rail returns that were revised to meet code. The additional work was done on Rule Steels request and behalf by Commercial Painting. Commercial Painting invoice #3391, dated 10/10/08</p>	(2,412.00)
		<hr/> (15,750.00)



1097 N. Rosario Street, Meridian, ID 83642 Phone (208)323-4500 Fax (208)323-4507

Date: November 19, 2008  
To: Keith Watts, Purchasing Manger, City Of Meridian  
From: Tom Coughlin, Project Manager  
Re: Rule Steel – Time Extension & Liquidated Damages  
Meridian City Hall

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Rule Steel's contract indicated a start date of July 16<sup>th</sup>, 2007 and a substantial completion date of October 5<sup>th</sup>, 2007. Rule Steel actually started erection on July 30<sup>th</sup>, 2007 and in Petra's opinion obtained substantial completion on February 8<sup>th</sup>, 2008. The substantial completion date is the date that Petra feels the structural steel was completed to a point so as not to impede any critical path follow-on work required to complete and/or dry-in the building. Work on the project by Rule Steel did continue after this date.

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Since November 1<sup>st</sup> Rule Steel has requested an additional 44 days for the pending change items included in proposed change order number PCO#02. Outlined below is a summary of the time extensions requested and recommended for the items included in both CO#01 and CO#02:

For the items included in CO #01(Previously approved with the caveat that any time extension due would be determined at a later date):

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- RFI-73 Sun Shade Connection – Time requested 3 days. Not recommended, did not impact the progress of the work.
- RFI-74 Angle Clips for Support of Wall – Time requested 3 days. Not recommended, this did not impact the progress of the work. As of Friday, 3/7/07 these clips had not been installed.
- Bent Plate @Grid H (Included with RFI-74) – Add bent plate, shop drawings marked incorrectly. Time requested 5 days. Recommended 5 days to the City.
- RFI-93 Relief Angle @ Stair Towers – Time requested 5 days. Not recommended, did not impact the work. This was for furnishing only.
- RFI-94 Furnish and install two chiller beams. Time requested 5 days. Not recommended; did not impact the work. This was issued and accomplished after the base building work on the critical path was completed.

This totals 13 of the 44 work days requested.

Converting the 13 work days recommended to calendar days results in an extension of 17 days.

Extending the schedule another 17 calendar days plus the 16 days lost to weather during the period would result in an additional extension of 33 calendar days and would push the contract completion date out from November 25 to December 28, 2007. Crediting Rule Steel with the 14 calendar days the start of erection was delayed would extend the completion date further to January 11, 2008.

The total time extension, considering both the CO#01, CO#02 items and the weather delays that Petra would recommend is 97 calendar days. The 97 calendar days represents a time extension that Petra feels would be fair and responsible to both Rule Steel and the City. Based on this Rule Steel would be liable for liquidated damages for a period of 28 calendar days based on the difference between the new proposed contractual completion date of January 11, 2008 and the actual substantial completion date of February 8, 2008. Per the contract liquidated damages are assessed at a rate of \$500/day. The total cost for these 28 days at \$500/Day would be \$ 14,000.

Please review this scenario and let me know if this line of reasoning is acceptable to the City. If this is acceptable Petra will propose this to Rule as settlement of the matter of the schedule delays and the time extensions requested for the various delays.

# Change Order Request Summary

Project: Meridian City Hall  
Date: August 28, 2008  
C/O Req. No.: Sixteen

Subcontractor: Rule Steel  
Reference: Bondo work on sunshades per  
Gene Bennett  
Description: Labor and equipment to bondo  
and smooth sunshade roll marks  
per instructions.

**Material:**

Item Description	Quantity	Unit Price	Extended
WF Beam		\$ 0.75	\$ -
Plate		\$ 0.75	\$ -
Tube		\$ 0.75	\$ -
Channel		\$ 0.75	
Anchors			
Bondo Materials			\$ 204.38
Total Mat.			\$ 204.38

*IMPROVE VISUAL APPEARANCE OF THE  
STRUCTURAL STEEL*

**Field Hours :**

**Detailing:**

**Painting Labor:**

Note: Labor rate includes OH&P  
and shop equipment

Hours	Rate/Hr	Extended
54.00	\$ 33.00	\$ 1,782.00
	\$ 50.00	\$ -
	\$ 45.00	\$ -
Total Shop		\$ 1,782.00

**Subcontractor/  
Supplier:**

Subcontractor/Supplier	Work Description	Quote Amount
JAG Equipment	Lift	\$ 944.00
Sub Total		\$ 944.00
		\$ -
Total Subcontractor/Supplier		\$ 944.00

**Change Order Request Amount**

\$ 2,930.38

**Sales Tax 6%**

\$ 12.26

**Total Change Order Request - Rounded**

\$ 2,943.00

**Added time to schedule - working days 0.0**

*OK - Per Gene B -*



**RULE  
STEEL**

& Tandem Master™ Jiffy Jack™

21986 Middleton Rd  
Caldwell, Idaho 83605

800 769-5636  
208 585-3031  
Fax 208 585-2506  
[rulesteel@rulesteel.com](mailto:rulesteel@rulesteel.com)

## FAX TRANSMITTAL

DATE: 8/28/08

PAGES: 5 (INCLUDING THIS COVER PAGE)

FROM: STEVE NORZUET

GEVE

TO: BENNETT COMPANY: PETRA INC.

FAX: 323-4507 PHONE: 323-4500

MESSAGE:

GEVE -

HERE IS THE COST FOR  
THE LAST BOPPO WORK ON THE  
SUNSHADES FOR YOUR REVIEW. PLEASE  
CALL ME IF YOU HAVE ANY QUESTIONS.  
I APPRECIATE YOUR HELP ON THIS.

THANK YOU -

OK - G3

HE TOOK 1/2 THE COST & THIS IS  
THE OTHER 1/2



## Change Order Request Summary

Project: Meridian City Hall  
 Date: August 28, 2008  
 C/O Req. No.: Sixteen

Subcontractor: Rule Steel  
 Reference: Bondo work on sunshades

Description: Labor and equipment to bondo  
 and smooth sunshade roll marks  
 per instructions.

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Tube		\$ 0.75	\$ -
Channel		\$ 0.75	
Anchors			
Bondo Materials			\$ 204.38
<i>Total Mat.</i>			\$ 204.38

**Field Hours :**

**Detailing:**

**Painting Labor:**

Note: Labor rate includes OH&P  
 and shop equipment

Hours	Rate/Hr	Extended
54.00	\$ 33.00	\$ 1,782.00
	\$ 50.00	\$ -
	\$ 45.00	\$ -
<i>Total Shop</i>		\$ 1,782.00

**Subcontractor/  
 Supplier:**

Subcontractor/Supplier	Work Description	Quote Amount
JAG Equipment	Lift	\$ 944.00
<i>Sub Total</i>		\$ 944.00
		\$ -
<i>Total Subcontractor/Supplier</i>		\$ 944.00

**Change Order Request Amount**

**\$ 2,930.38**

**Sales Tax 6%**

**\$ 12.26**

**Total Change Order Request - Rounded**

**\$ 2,943.00**

**Added time to schedule - working days**

**0.0**

<del>Steve Johnson</del> <del>Steve Johnson</del> <del>Steve Johnson</del>		HRS
Aug 20		
	10:30 - 12:30: meeting at Meridian City Hall	2
	NAPA Eagle to purchase primer & putty	
	middletown to get tools	
21 <sup>ST</sup>	7:00 - 5:00 -	10
22 <sup>ND</sup>	7:30 - 1/2 hr. Lunch 1:00 -	5
SAT 23 <sup>RD</sup>	7:30 - 11:00	3.50
25 <sup>TH</sup>	7:30 - 1 hr. Lunch 4:00	7.50
Total		<del>28</del> 28

Steve Johnson		HRS
21 <sup>ST</sup>	7:00 - 5:00	10
22 <sup>ND</sup>	7:30 - 1/2 hr. Lunch 1:00	5
SAT 23 <sup>RD</sup>	7:30 - 11:00	3.50
25 <sup>TH</sup>	7:30 - - 1 hr. Lunch 4:00	7.50
Total		28

28 + 26 = 54  
Hours



# EAGLE AUTO PARTS

208 939-8261  
301 E STATE ST  
EAGLE 65616

Emp 2 INVOICE# 719408 8/21/08 17:18

00000

Cash Sale  
Thankyou For Shopping Your  
Napa Store

Description	Qty	Net	Total
PUTTY MS 6394	5	12.99	64.95 T
RED IC FP102	12	6.29	75.48 T
Subtotal			140.43
Tax 6% TAXTABLE 1			8.48

**TOTAL DUE** [REDACTED]  
CASH

RECEIPT REQUIRED  
FOR RETURNS

WARRANTY INFORMATION  
AVAILABLE  
ON REQUEST

<< CUSTOMER COPY >>



# EAGLE AUTO PARTS

208 939-8261  
301 E STATE ST  
EAGLE 65616

Emp 4 INVOICE# 719213 8/20/08 11:17

00000

Cash Sale  
Thankyou For Shopping Your  
Napa Store

Description	Qty	Net	Total
RED IC FP102	2	6.29	12.58 T
PUTTY MS 6394	5	12.99	64.95 T
GRAY IC FP101	2	5.29	12.58 T

Subtotal 50.11  
Tax 6% TAXTABLE 1 5.41

**TOTAL DUE** [REDACTED]  
CASH

RECEIPT REQUIRED  
FOR RETURNS

WARRANTY INFORMATION  
AVAILABLE  
ON REQUEST

<< CUSTOMER COPY >>

**FULL 2000**

01-0766个5-05

RULE STEEL  
21906 MIDDLETON RD  
CALDWELL, ID 83605

RULE STEEL  
21986 MIDDLTON RD  
CALDWELL, ID 83605

505-5031

P/D NUMBER: JOB #2500  
DELIVER TO NEW CITY HALL      MERIDIAN  
P#37551

Delivery THU 08/21/88  
Out: THU 08/21/88 20:00  
In: TUE 08/26/88 14:40

Station No.	City	Description	Rate	In	Out	Unit	Extended
1	1	1	1	1	1	1	1
2	2	2	2	2	2	2	2
3	3	3	3	3	3	3	3
4	4	4	4	4	4	4	4
5	5	5	5	5	5	5	5
6	6	6	6	6	6	6	6
7	7	7	7	7	7	7	7
8	8	8	8	8	8	8	8
9	9	9	9	9	9	9	9
10	10	10	10	10	10	10	10
11	11	11	11	11	11	11	11
12	12	12	12	12	12	12	12
13	13	13	13	13	13	13	13
14	14	14	14	14	14	14	14
15	15	15	15	15	15	15	15
16	16	16	16	16	16	16	16
17	17	17	17	17	17	17	17
18	18	18	18	18	18	18	18
19	19	19	19	19	19	19	19
20	20	20	20	20	20	20	20
21	21	21	21	21	21	21	21
22	22	22	22	22	22	22	22
23	23	23	23	23	23	23	23
24	24	24	24	24	24	24	24
25	25	25	25	25	25	25	25
26	26	26	26	26	26	26	26
27	27	27	27	27	27	27	27
28	28	28	28	28	28	28	28
29	29	29	29	29	29	29	29
30	30	30	30	30	30	30	30
31	31	31	31	31	31	31	31
32	32	32	32	32	32	32	32
33	33	33	33	33	33	33	33
34	34	34	34	34	34	34	34
35	35	35	35	35	35	35	35
36	36	36	36	36	36	36	36
37	37	37	37	37	37	37	37
38	38	38	38	38	38	38	38
39	39	39	39	39	39	39	39
40	40	40	40	40	40	40	40
41	41	41	41	41	41	41	41
42	42	42	42	42	42	42	42
43	43	43	43	43	43	43	43
44	44	44	44	44	44	44	44
45	45	45	45	45	45	45	45
46	46	46	46	46	46	46	46
47	47	47	47	47	47	47	47
48	48	48	48	48	48	48	48
49	49	49	49	49	49	49	49
50	50	50	50	50	50	50	50
51	51	51	51	51	51	51	51
52	52	52	52	52	52	52	52
53	53	53	53	53	53	53	53
54	54	54	54	54	54	54	54
55	55	55	55	55	55	55	55
56	56	56	56	56	56	56	56
57	57	57	57	57	57	57	57
58	58	58	58	58			

165-0050	1.0	SELF PROPELLED MAN LIFT	EQ	245.00	725.00	735.00
		Rate:		245.00/d	735.00/w	2205.00/20d
Notes:	2.0	0.0out	0.0=in /HRxx	24.0w/ree	25.000	2.00
		Returned:	MON 08/25/00 16:20			
		37 FOOT LIFT FROM BROWNS				

505-0010 14.0 .00E R & V OIL 6.00 04.00  
SOLD OUT TUE 08/26/03 14:40

Receipts Summary		Summary	
Date	Qty Method Ref/PO	Amount	
03/26/95	05 Charge	944.00	RE-RENT 735.00
			GENERAL RESALE 94.00
>>>>Amt Due this Invoice:		944.00	Pickup/Delivery 125.00
Total Unpaid this Contract:		944.00	Total 944.00

TUE 08/26/08 14:40

Pa Sales Agent  
NOTE

Date: Customer  
08/26 RULE STEEL

Contract :  
01-070545-25

290275

**PURCHASE ORDER**

TO <i>Petra Const. Co.</i>		SHIP TO <i>Comm. Painting Co.</i>	
ADDRESS		ADDRESS	
CITY, STATE, ZIP		CITY, STATE, ZIP <i>Meridian City Hall</i>	
DATE <i>10-1+2-8</i>	DATE REQUIRED	TERMS	HOW SHIPPED
REQ. NO. OR DEPT.		FOR	
QUANTITY	DESCRIPTION	PRICE	UNIT
1			
2	<i>1st &amp; 2nd Coat on Brackets + Interior</i>		
3	<i>FACES on EXTENSION SUN SCREENS</i>		
4	<i>ON SOUTH + SOUTHWEST SIDES</i>		
5	<i>PAINT END TO END</i>		
6	<i>1 Coat on NORTH WEST Side</i>		
7			
8			
9			
10	<i>Weds - 8</i>		
11	<i>Thurs - 7.5</i>	<i>&gt; 15.5 total @ 35</i>	<i>542.50</i>
12			
13			
14	<i>1.5 GAL. @ 25.</i>		<i>37.50</i>
15			<i>580.00</i>
16			
17	<i>Mile L. BL</i>		
18			
19			
20	<i>After Moving Shade Brackets by Rule</i>		
21			
22			

**IMPORTANT**

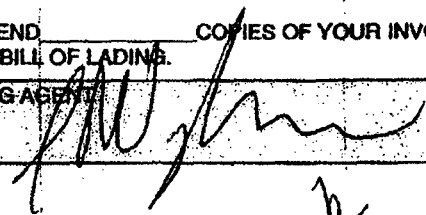
PURCHASE ORDER NUMBER MUST APPEAR ON ALL INVOICES - PACKAGING, ETC.

PLEASE NOTIFY US IMMEDIATELY IF YOU ARE UNABLE TO COMPLETE ORDER BY DATE SPECIFIED.

PLEASE SEND ORIGINAL BILL OF LADING.

COPIES OF YOUR INVOICE WITH

PURCHASING AGENT



OK

ORIGINAL

B/C RULC

8131

290277

**PURCHASE ORDER**

TO <u>Petra Const. Co.</u>		SHIP TO <u>Comm. Painting Co.</u>	
ADDRESS		ADDRESS	
CITY, STATE, ZIP		CITY, STATE, ZIP <u>Meridian City Hall</u>	
DATE <u>10-3-8</u>	DATE REQUIRED	TERMS	HOW SHIPPED
			REQ. NO. OR DEPT.
			FOR

QUANTITY	DESCRIPTION	PRICE	UNIT
1			
2	2 <sup>nd</sup> Coat Sunshades N.W. Corner		
3	2 <sup>nd</sup> Coat North Side Sunshades		
4	Cover and Protect		
5			
6			
7			
8			
9			
10			
11	Rule Steel change brackets		
12			
13	Pat 3. 7-12		
14	Mike L. - 5 hrs. each		
15	Steve G. -		
16			
17			
18			
19	15 @ 35	525	00
20			
21	BL		
22			

<b>IMPORTANT</b> PURCHASE ORDER NUMBER MUST APPEAR ON ALL INVOICES - PACKAGING, ETC. PLEASE NOTIFY US IMMEDIATELY IF YOU ARE UNABLE TO COMPLETE ORDER BY DATE SPECIFIED.	PLEASE SEND _____ COPIES OF YOUR INVOICE WITH ORIGINAL BILL OF LADING. PURCHASING AGENT <u>GENE BENNETT</u>
--	---

ORIGINAL

B/C Rule

OK

## Tom Coughlin

---

**From:** Tom Coughlin  
**Sent:** Wednesday, January 14, 2009 8:55 AM  
**To:** 'Steve Norquist'  
**Cc:** Gene Bennett  
**Subject:** Backcharges - MCH  
**Attachments:** Rule Stl Backcharge Inv 011408.pdf

Steve

Attached are the invoices for two additional backcharge items totaling \$1,176 that can up in billing reviews with the City. I will include them in the final settlement along with the painting backcharges forwarded previously upon approval of the settlement by the owner.

Call if you have any questions.  
Thanks  
Tom Coughlin



Tom Coughlin  
Project Manager  
PETRA, Inc.  
1097 N Rosario St.  
Meridian, ID 83642  
P:208-323-4500  
C:208-919-8583  
F:208-323-4507  
tcoughlin@petrainc.net  
www.petrainc.net

*mett*  
*Rule*  
*sol*  
*ph 3*

1/14/2009

006418  
CM101697



CUSTOM GLASS

AUTHORIZED DISTRIBUTOR  
HORTON AUTOMATICS254 LOOP STREET  
CALDWELL, IDAHO 83605  
208-454-0340 FAX 208-454-0391  
customgl@msn.com

RECEIVED

OCT 0 8 2008

INVOICE

DATE

INVOICE NO.

PAGE

09/30/2008

12255

1

ACCOUNT NO.

MANAGER

PETRA

Invoice

BILL TO:

PROJECT:

MERIDIAN CITY HALL -BACKCHARGE

PETRA, INC.  
1097 N. ROSARIO PL  
MERIDIAN, ID 83642PETRA, INC.  
1097 N. ROSARIO PL  
MERIDIAN, ID 83642

09/30/2008	Invoice	TOM	09-23325	
C L	REMOVE SKYLIGHTS PREVIOUSLY INSTALLED. DUE TO BAD CLIP LAYOUT BY STEEL FABRICATORS. LABOR-AUTHORIZED BY JC 9/16/08  <i>Rule Steel HAD TO REVISE CLIPB.</i>	20.000 HRS	\$50,000	\$1,000.00
Job Name: <u>mcd</u> Job Number: <u>060675</u> Cost Code: <u>01-110</u> Authorized by: <u>[Signature]</u> Date Posted: <u>      </u> By: <u>      </u> Budget: <u>      </u> Over Budget: <u>      </u>		ENTERED OCT 0 8 2007		
MIT PAYMENT TO:		TERMS:		
CUSTOM GLASS, INC 254 LOOP STREET CALDWELL, ID 83605-6092		10 EOM		\$1,000.00 \$0.00 \$0.00 \$0.00 \$1,000.00

All bills are due and payable on the 10th of the month following the invoice date and are past due on the 11th. Past due accounts are subject to a FINANCE CHARGE of 11/2% per month on the unpaid balance for an ANNUAL PERCENTAGE RATE of 18%.



Customer # 3958

1	3711-E670	FAN, PEDESTAL 30" - 36"	Out	10/10/08 1:30pm	\$55.50
1	3711-E732	FAN, PEDESTAL 30" - 36"	Out	10/10/08 1:30pm	\$55.50

Thank you for your Business

open INVOICE

PO# J118082

Back charge to Rule Steel  
Ventilation for stairs  
during Flush.

HANDRAIL Removal  
WORK

Job 06-0675

Invoice

ENTERED  
OCT 30 2007

Job Name: Mall  
Job Number: 06-0675  
Cost Code: 01-547  
Authorized by: [Signature]  
Date Posted:            By:             
Budget:             
Over Budget:

**Commercial Painting Contractors, Inc.**

4403 Challenger Way  
Caldwell, ID 83605 RCE #3490  
Dunns #11-541-2251  
Federal ID # 82-0514299

**Invoice**

DATE	INVOICE #
10/10/2008	3391

**BILL TO**

Rule Steel  
21802 Middleton Rd.  
Caldwell, Idaho 83605  
ATTN.: Steve Norquist

				P.O. NO.	TERMS		PROJECT		
							Meridian City H...		
ITEM	DESCRIPTION	Est Amt	Prior ...	Prior %	QTY	RATE	Curr %	Total %	AMO...
Job R...	8/20/08: S. Stair prep Labor	140.00			4	35.00	100.00%	100.00%	140.00
Job R...	8/25/08: S. Stair prep Labor	560.00			16	35.00	100.00%	100.00%	560.00
Job R...	8/27/08: S. Stair prep Labor	122.50			3.5	35.00	100.00%	100.00%	122.50
Job R...	8/27/08: S. Stair prep Labor	87.50			3.5	25.00	100.00%	100.00%	87.50
Job R...	9/3/08: Middle Stair prep Labor	100.00			4	25.00	100.00%	100.00%	100.00
Job R...	9/4/08: Middle Stair prep Labor	192.50			5.5	35.00	100.00%	100.00%	192.50
Job R...	9/15-9/17/08: Middle Stair prep Labor	650.00			26	25.00	100.00%	100.00%	650.00
Job R...	9/30/08: Repaint misc. Sunshades Labor	560.00			16	35.00	100.00%	100.00%	560.00
Thank you for your business.						<b>Total</b>		<b>\$2,412.50</b>	

ORIGINAL

NO. \_\_\_\_\_  
FILED 4:15  
A.M. P.M.

SEP 20 2010

J. DAVID NAVARRO, Clerk  
By KATHY BIEHL  
DEPUTY

Thomas G. Walker (ISB 1856)  
Erika Klein (ISB 5509)  
Mackenzie Whatcott (ISB 6774)  
Matthew Schelstrate (ISB 8276)  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**AFFIDAVIT OF EUGENE R. BENNETT  
DATED SEPTEMBER 20, 2010 IN  
OPPOSITION TO THE CITY OF  
MERIDIAN'S MOTION FOR  
SUMMARY JUDGMENT AND  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT RE: LIABILITY**

STATE OF IDAHO       )  
                                  ) ss.  
County of Ada        )

Eugene R. Bennett, being first duly sworn upon oath, deposes and states:

1. I make this Affidavit based upon my own personal knowledge and I am competent to testify to the facts set forth below if called as a witness.

2. I have more than 39 years of experience in the construction industry.

3. I am a licensed Construction Manager in the State of Idaho.<sup>1</sup>

4. I am employed by Petra Incorporated ("Petra").

5. I was hired by Petra on September 20, 1999 and have been employed there ever since.

6. My current title is Senior Advisor.

7. I have worked on more than 50 construction projects over the past 10 years.

8. Of those projects, approximately 20 were construction manager projects.

9. I served as project manager on the new Meridian City Hall project ("Project").

10. I am one of the custodians of Petra's business records.

11. The documents referred to herein are true, correct and complete copies of the documents in Petra's files or documents produced by the City of Meridian ("City" or "Meridian") during the course of this litigation, which files and documents are kept in the course of Petra's regularly conducted business activity. It is Petra's regular practice to make and/or keep such documents.

12. The City claims that because the Petra did not provide a single discrete written report, it should not have received its fee for the Development Strategies Phase. The owner's criteria was not provided by the City in a single documents. Rather, the Project evolved over

---

<sup>1</sup> See Exhibit 505 attached to my Affidavit dated September 13, 2010.

time up through August 2008 when the City added the East Parking Lot. The owner's criteria were developed during this period of time and Petra and LCA responded to the evolving criteria in collaboration with the City. The collaboration efforts were documented in meeting minutes, monthly reports and emails.

13. The City paid Petra its fee with full knowledge it had not received a discrete written report.

14. For the City four years later to claim that it was owed the report and the failure to provide is a breach of the Construction Management Agreement is disingenuous.

15. Petra and the City of Meridian collaborated over time with an evolving owner's criteria.

16. There was never a time when a single report could have been issued that would have been relevant and not immediately outdated.

17. Through the course of dealings, the development strategies was on-going and the required items in the contract of design, construction, scheduling, budgetary, operational or other problems were delivered to the City in a series of reports, meetings, and other actions.

18. Since this was a phased project over a period of time, there never was one point in time with one set of drawings from which to produce a report on all of the owner's criteria.

19. Since the City wanted the Project fast tracked, the report developed into a series of reports which were delivered to the City and the work was done.

20. Sequentially, the payment item now questioned by the City occurred in the pay schedule prior to the site preparation phase (demolition) and the preliminary design phase.

21. The handling of the Rule Steel Change Order No. 1 was done correctly and in conformance with 7.2.4 of the Construction Management Agreement.

22. The City's representatives and Petra's representatives agreed upon a Substantial Completion Date for the Project of October 15, 2008.

23. The prime contractors with the exception of Rule Steel all achieved substantial completion on time. Although assessed liquidated damages for delays, Rule Steel achieved substantial completion. As noted above, the parties agreed to October 15, 2008 as the Substantial Completion Date.

24. Additionally, I note that in the City's *Motion for Summary Judgment*, the City contends that Petra should have tracked its hours differently for Change Order No. 2. The original draft of Change Order No. 2 did not include any claim for reimbursable salary expenses, but were added in the first revision.

25. Petra tracked those hours over and above the negotiated hours, which were due to the City increasing the projects scope, size, and complexity. This was the only way to track the hours. It would have been impossible to track the time spent on each discrete task in the manner the City is now suggesting.

26. The hours tracked in Change Order No. 1 were more detailed because the soil issue was a single development that could be carved out and tracked. The hours in furtherance of Change Order No. 2 were incurred under completely different circumstances.

27. Petra is not seeking compensation for work prior to November 2007.

28. The payroll charts include hours prior to this date in order to show how Petra

arrived at total hours.

29. Additionally, I note that the City in its *Motion for Summary Judgment* argues that Petra should have received City Council approval of Change Order No. 2 prior to doing the work.

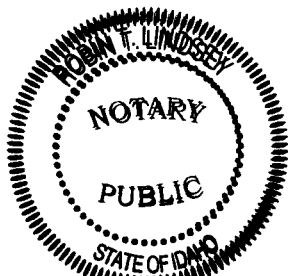
30. This was never the City's practice with change orders. Change Order No. 1 was approved in September of 2007, months after Petra had completed its work with regard to the soil contamination in May of 2007.

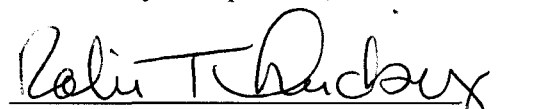
31. I on behalf of Petra ensured that Petra gave timely notice of its intent to seek the fee and felt obligated in good faith to continue working on the Project.

32. I never expected the City to deny the fee request and consequently did not stop work while waiting to hear back from the City.

  
EUGENE R. BENNETT

SUBSCRIBED AND SWORN to before me this 20<sup>th</sup> day of September, 2010.

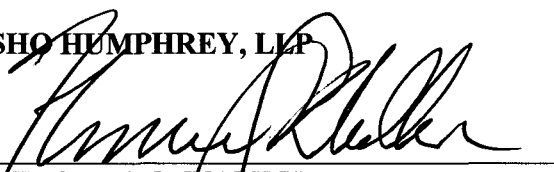


  
Notary Public for Idaho  
Residing at Boise, Idaho  
My commission expires: 10/10/2013

DATED: September 20, 2010.

COSHO HUMPHREY, LLP

By:

  
THOMAS G. WALKER  
Attorneys for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20<sup>th</sup> day of September, 2010, a true and correct copy  
of the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☐ U.S. Mail  
☒ Hand Delivery  
☐ Overnight Courier  
☐ Facsimile  
☐ E-mail:

  
THOMAS G. WALKER



ORIGINAL

NO. \_\_\_\_\_ FILED 4:25  
A.M. \_\_\_\_\_ P.M.

SEP 20 2010

J. DAVID NAVARRO, Clerk  
By KATHY BIEHL  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
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[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, AN IDAHO  
MUNICIPAL CORPORATION,

Plaintiff,

v.

PETRA, INCORPORATED, AN IDAHO  
CORPORATION. ,

Defendant.

Case No. 09-07257

AFFIDAVIT OF THOMAS G.  
WALKER DATED SEPTEMBER 20,  
2010

STATE OF IDAHO )  
 ) ss.  
County of Ada )

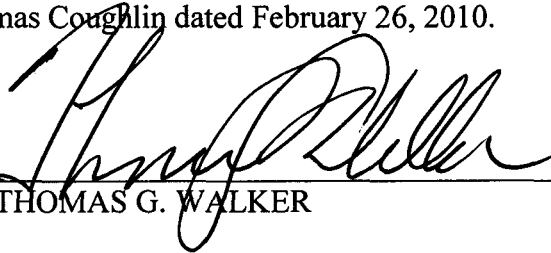
I, THOMAS G. WALKER, being first duly sworn upon oath, depose and state:

1. I am one of the attorneys of record for the Defendant/Counterclaimant, Petra Incorporated ("Petra"), in the above entitled action and I make this affidavit based on my own personal knowledge of the facts set forth herein.

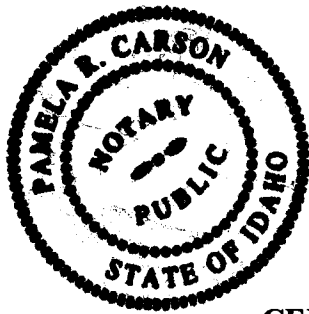
2. I submit this affidavit in support of Petra's Opposition to Motion for Leave to File First Amended Complaint and Add Claim for Punitive Damages Pursuant to Idaho Code § 6-1604.

3. I am one of the custodians of records of Cosho Humphrey, LLP, which include memoranda, legal documents, reports, correspondence, emails, records, research and data compilations, in various forms that are kept in the course of Cosho Humphrey, LLP's regularly conducted business activity, and which are made and maintained as the regular practice of Cosho Humphrey, LLP.

4. Attached hereto as Exhibit "A" is a true and correct copy of relevant excerpts from the transcript of the deposition of Thomas Coughlin dated February 26, 2010.

  
THOMAS G. WALKER

SUBSCRIBED AND SWORN to before me this 20<sup>th</sup> day of September, 2010.



Pamela R. Carson

Notary Public for Idaho

Residing at Eagle, Idaho

My commission expires: March 31, 2016.

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20th day of September, 2010, a true and correct copy of  
the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Overnight Courier
- ☐ Facsimile
- ☐ E-mail:

Thomas G. Walker  
THOMAS G. WALKER

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho )  
Municipal Corporation, )  
 ) Case No. CV OC 09-7257  
 )  
Plaintiff, )  
 )  
v. )  
 )  
PETRA, INCORPORATED, an Idaho )  
Corporation, )  
 )  
Defendant. )

DEPOSITION OF THOMAS R. COUGHLIN  
February 26, 2010  
Boise, Idaho

**Janet French, CSR #946, RPR**

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Page 3

## DEPOSITION OF THOMAS R. COUGHLIN

BE IT REMEMBERED that the deposition of THOMAS R. COUGHLIN was taken by the Plaintiff at the offices of Trout Jones Gledhill Fuhrman, P.A., located at 225 North 9th Street, Suite 820, Boise, Idaho, before Associated Reporting, Inc., by Janet French, a Court Reporter and Notary Public in and for the County of Ada, State of Idaho, on Friday, the 26th day of February, 2010, commencing at the hour of 9:30 a.m. in the above-entitled matter.

**APPEARANCES:**

**For the Plaintiff: TROUT JONES GLEDHILL FUHRMAN, P.A.**  
**By: Kim J. Trout, Esq.**  
**225 North 9th Street, Suite 820**  
**Post Office Box 1097**  
**Boise, Idaho 83701**  
**Telephone: (208) 331-1170**  
**Facsimile: (208) 331-1529**  
**kt trout@idalaw.com**

**For the Defendant: COSHO HUMPHREY, LLP**  
**By: Thomas G. Walker, Esq.**  
**800 Park Blvd., Suite 790**  
**Post Office Box 9518**  
**Boise, Idaho 83707-9518**  
**Telephone: (208) 344-7811**  
**Facsimile: (208) 338-3290**  
**twalker@cosholaw.com**

**Also Present: Richard Kluckhohn**

Page 2

# PROCEEDINGS

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THOMAS R. COUGHLIN,  
a witness having been first duly sworn to tell the  
truth, the whole truth, and nothing but the truth,  
testified as follows:

## EXAMINATION

BY MR. TROUT:

Q. Sir, would you state your name for the record and spell the last.

A. Tom Coughlin, C-O-U-G-H-L-I-N.

Q. Mr. Coughlin, have you ever been deposed before?

A. No.

Q. I'm going to ask you a series of questions today and in order for our record to be complete, I need to ask you a couple of preliminary questions. First of all, I'm not meaning to pry at all, Tom, but is there anything about your physical condition as it exists today that would impair your ability to hear or understand and respond to questions I might ask you?

A. No.

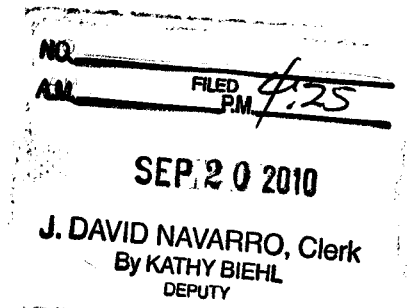
Q. All right. If I ask you a question, and you respond to it, can we agree that for this record that

Page 4

<p>1 significance, if any, is the certification of the  2 completion of the work by a prime contractor important  3 with respect to the City of Meridian City Hall  4 Project?  5 A. Like I said, it is used as a document to  6 establish a completion date for beginning of warranty.  7 Q. Any other importance?  8 A. It is used as a date to signify an  9 acceptance date by the owner.  10 Q. Any other importance?  11 A. The owner's insurance usually takes over  12 that date.  13 Q. Any other importance?  14 A. That's pretty much it, in my mind.  15 Q. Okay. In your work as the project engineer  16 for Petra on the City of Meridian project, did Petra  17 ever receive a written change order request for  18 weather extension from any prime contractor?  19 A. Yes.  20 Q. Who?  21 A. Rule Steel.  22 Q. And who within Petra was responsible for the  23 review of that written change order request?  24 A. At the time, it would have been Wes Bettis.  25 Q. Okay. When did Mr. Bettis leave Petra's</p> <p style="text-align: right;">Page 37</p>	<p>1 Q. Have you seen some document that is a  2 written change order request from Rule Steel with  3 respect to weather?  4 A. Yes.  5 Q. What's that document look like?  6 A. There were several letters, I believe.  7 Q. Have all of those been produced?  8 A. To the best of my knowledge, yes.  9 Q. All right. And when a request for a change  10 order based on weather is received by Petra, what, if  11 anything, is done with that request?  12 A. It is evaluated.  13 Q. And tell me, was an evaluation done by  14 Mr. Bettis?  15 A. It looked like it, yes.  16 Q. And looked like it from what? What, if any,  17 evaluation have you seen that was prepared by  18 Mr. Bettis?  19 A. If I remember correctly, there were some  20 memos or written responses back to Rule, I think, that  21 pertained to those.  22 Q. Have you seen any other evaluation, other  23 than a memorandum of some kind that was prepared by  24 Mr. Bettis?  25 A. As far as what Mr. Bettis did?</p> <p style="text-align: right;">Page 39</p>
<p>1 employment?  2 A. Sometime in November.  3 Q. Of what year?  4 A. '07.  5 Q. After you began work at Petra?  6 A. Yes. Very shortly after.  7 Q. Okay. Do you know why Mr. Bettis left  8 Petra's employment?  9 A. No.  10 Q. Did you ever have a discussion with  11 Mr. Frank about why Mr. Bettis left Petra's  12 employment?  13 A. No.  14 Q. Did you ever have a discussion with  15 Mr. Bennett about why Mr. Bettis left Petra's  16 employment?  17 A. No.  18 Q. Did you ever have a discussion with  19 Mr. Bettis about why --  20 A. Nope.  21 Q. -- he left their employment?  22 A. No.  23 Q. Did you ever have a discussion with anyone  24 about why Mr. Bettis left Petra's employment?  25 A. No.</p> <p style="text-align: right;">Page 38</p>	<p>1 Q. Yes.  2 A. No. As far as what Mr. Bettis said,  3 that's -- it was letters dealing with weather.  4 Q. Only letters? Have you seen anything else?  5 A. That Mr. Bettis wrote? No.  6 Q. Okay. Did Petra keep and maintain a file of  7 any kind with respect to the weather evaluation?  8 A. After Mr. Bettis left, I picked up the Rule  9 file, and I took that over, yes. And weather was  10 dealt with in the evaluation for the change to Rule  11 for both liquidated damages and a schedule extension,  12 yes.  13 Q. Okay. So tell me what evaluation, if any,  14 you did.  15 A. With regards to weather?  16 Q. Yes, sir.  17 A. Looked at their request and what they were  18 requesting and when they were requesting it.  19 Q. Anything else?  20 A. Compared it to our daily reports to see if  21 they worked on those days.  22 Q. Okay. Anything else?  23 A. No.  24 Q. Okay. So the only evaluation -- or the only  25 data that you used in evaluating weather would have</p> <p style="text-align: right;">Page 40</p>

<p>1 been the written requests made by Rule and the daily 2 reports that were kept and maintained by Petra; is 3 that correct? 4 A. I don't believe -- I might have checked 5 the -- some of the weather data available online, 6 yeah. 7 Q. Did you keep any record of that? 8 A. No. 9 Q. All right. Did you actually check any 10 weather data online? 11 A. I believe I did, yes. 12 Q. Okay. Can you tell me when? 13 A. No. It would have been in the period when 14 we were dealing with Rule's request. 15 Q. And do I understand that to have been after 16 Rule's work was complete? 17 A. The majority of it, probably, yes. 18 Q. Did you keep any kind of a memoranda of any 19 kind related to the work you performed in evaluating 20 Rule's weather request? 21 A. No. It was recorded in a memo to the City. 22 Q. All right. And can you tell me what weather 23 data you looked at? 24 A. As far as? 25 Q. Evaluating Rule's request. What weather Page 41</p>	<p>1 provided to me the one that was utilized by Petra in 2 its evaluation of schedule on this project? 3 A. I'm not sure I understand your question. As 4 far as -- 5 Q. Okay. What, if any, definition of critical 6 path was utilized by Petra in its schedule evaluations 7 on this project? 8 A. I'm not sure I can answer that. 9 Q. Well, is there someone else who is better 10 qualified to answer that than you? 11 A. If you're talking about from the beginning 12 of the project -- I'm not exactly sure what you're 13 looking for. 14 Q. All right. I'll narrow it down in terms of 15 time. That's fair. In the period of time that you 16 were serving as the project engineer for Petra on the 17 Meridian City Hall Project, what definition of 18 critical path was utilized by yourself in the 19 evaluation of schedule for the Meridian City Hall 20 Project? 21 A. The -- are you talking in relation to Rule, 22 or everyone? 23 Q. I'm talking in general for the moment. 24 A. Okay. It's the critical activities that had 25 to get done for progress to progress, so the project Page 43</p>
<p>1 data, if any, did you look at? 2 A. I've told you what I looked at. Online, our 3 daily reports. What are you -- 4 Q. What did you look at online? 5 A. Whether it was rain, how much rain, 6 temperatures. 7 Q. For the days requested? 8 A. Yes. 9 Q. Okay. Any other weather data that you 10 looked at? 11 A. No. 12 Q. All right. 13 A. Is there something specific you're looking 14 for? 15 Q. I'm just asking questions about what you 16 did. Have you told me everything that you have done? 17 A. Uh-huh. 18 Q. Okay. Does the term "critical path" have 19 any meaning for you? 20 A. Yes. 21 Q. Tell me what critical path is. 22 A. With relation to a schedule, it's the 23 shortest most direct way through the -- from start to 24 finish. 25 Q. Okay. Is that definition that you just Page 42</p>	<p>1 was completed on time. 2 Q. All right. Was a critical path schedule 3 ever prepared by Petra during your tenure as the 4 project engineer on this project? 5 A. The schedule was in a maintenance state at 6 that time, and yes, the superintendent prepared it -- 7 updated it. 8 Q. Was there ever a schedule prepared that 9 contained an identification of the critical path by 10 Petra during your tenure as the project engineer? 11 A. A new schedule, no. I don't believe so. 12 There was the maintenance of the schedule they had 13 produced and the production -- the short -- the look 14 ahead schedules. 15 Q. So would I be correct in understanding that 16 during your tenure as the project engineer, a document 17 was never created by Petra that contained an 18 identification of the critical path for the Meridian 19 City Hall Project? 20 A. No, you wouldn't. 21 Q. All right. Tell me where I would find that 22 document? 23 A. Documents were produced. There is a long 24 list of schedules. 25 Q. Okay. I have looked through every schedule Page 44</p>

ORIGINAL



Thomas G. Walker (ISB 1856)  
Erika Klein (ISB 5509)  
Mackenzie Whatcott (ISB 6774)  
Matthew Schelstrate (ISB 8276)  
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Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant.

Case No. CV OC 0907257

**AFFIDAVIT OF RICHARD BAUER  
DATED SEPTEMBER 17, 2010**

STATE OF IDAHO                     )  
  ) ss:  
County of Ada                     )

Richard Bauer, being first duly sworn, deposes and states upon his oath the following:

1. I am the Senior Vice President of Lemley International.
2. My professional training, experience, professional associations and licensing are set forth in my curriculum vitae that was attached to my affidavit dated September 13, 2010.

3. I have been pursuing my work in the engineering and construction industries for over 40 years.

4. I am an expert in the fields of construction, construction management and engineering. I am a licensed Construction Manager in the State of Idaho.

5. Paragraph 1.1 of the Construction Management Agreement states as follows:

“Construction Manager acknowledges and accepts the relationship of trust and confidence established with Owner by this Agreement and that this relationship is a material consideration for Owner in entering into this Agreement. Accordingly, Construction Manager shall, at all times, act in a manner consistent with this relationship. Construction Manager further covenants that Construction Manager will perform its services under this Agreement, in the exercise of ordinary and reasonable care and with the same degree of professional skill, diligence and judgment as is customary among construction managers of similar reputation performing work for projects of a size, scope and complexity similar to the Project. Construction Manager shall, at all times, further the interest of Owner through efficient business administration and management.”

6. The relationship established by and the duties and responsibilities described in the foregoing paragraph express the standard commercial relationship that exists between an owner and an agency construction manager not-at-risk.

7. As I testified in my September 13, 2010 affidavit, Petra's duties and responsibilities were limited by the terms and conditions of the Construction Management Agreement. For instance, Petra's scope of services under the Construction Management Agreement did not include acting as the City's agent with regard to the architects. Rather, Petra's responsibility was to “consult and coordinate with the architect as needed.” See Construction Management Agreement at 3.3. In addition, Petra did not have any inspection or testing responsibilities. Petra's duty was to observe the Work of the contractors hired directly by

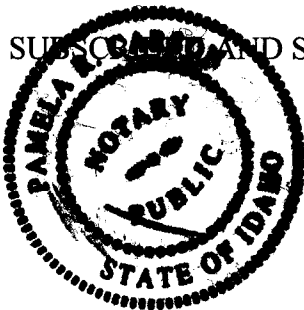


the City. Further, I have concluded from my review of the affidavits and legal memoranda filed by Meridian that the City is attempting to greatly expand the duties and responsibilities Petra undertook as an agency construction manager not-at-risk. Importantly, Petra was only required to act on the City's behalf with regard to the construction contracts.

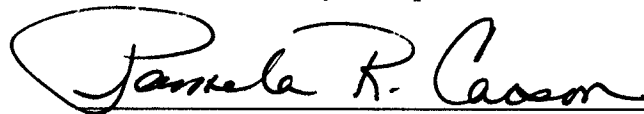
8. My opinions expressed in this affidavit and in my September 13, 2010 affidavit are my opinions arrived at through the exercise of my independent professional judgment.

September 17, 2010.

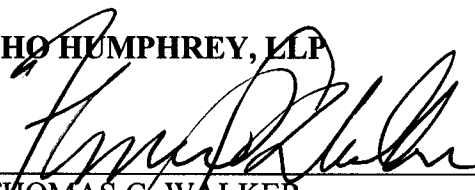
  
\_\_\_\_\_  
RICHARD BAUER



SUBSCRIBED AND SWORN To before me this 17<sup>th</sup> day of September, 2010.

  
\_\_\_\_\_  
NOTARY PUBLIC FOR IDAHO  
Residing at Boise, Idaho  
My Commission Expires 3/31/2016

DATED: September 17, 2010

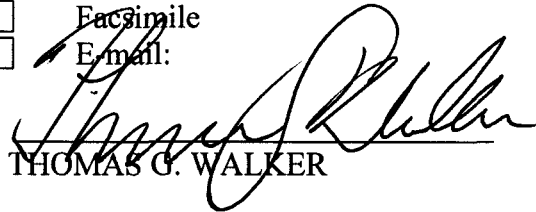
**COSHO HUMPHREY, LLP**  
  
By: \_\_\_\_\_  
THOMAS G. WALKER  
Attorneys for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of September, 2010, a true and correct copy  
of the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

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THOMAS G. WALKER

ORIGINAL

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[mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com).

Attorneys for Defendant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, AN IDAHO  
MUNICIPAL CORPORATION,

Plaintiff,

v.

PETRA, INCORPORATED, AN IDAHO  
CORPORATION. ,

Defendant.

Case No. CV OC 09-07257

**PETRA'S OPPOSITION TO THE CITY OF  
MERIDIAN'S MOTION FOR SUMMARY  
JUDGMENT**

Petra Incorporated ("Petra") submits this Memorandum in Opposition to the Motion for Summary Judgment filed by the City of Meridian ("Meridian" or "City").

**1. INTRODUCTION**

The City's Motion for Summary Judgment is premised on flawed interpretations of the Construction Management Agreement and factual inaccuracies. Petra respectfully requests that

the Court deny the City's Motion.

First, the City incorrectly contends that Petra failed to give proper notice of its "claim" for an additional construction management fee ("CM fee"). Not only is the City's interpretation of the term "claim" contrary to the plain language of the Construction Management Agreement, it contradicts the use of the term in the industry, is at odds with the parties' common interpretation of the Construction Management Agreement as shown by their course of conduct, and is not in conformance with the definition of "claim" in Idaho Code § 6-902. Further, equitable principles should bar the City from taking this position.

Second, Petra complied with the Construction Management Agreement with respect to its request for reimbursable salary costs. The City is factually incorrect on this issue, ascribes an unreasonable and erroneous interpretation to paragraph 6.2.2 of the Construction Management Agreement, and further is estopped from now taking this position.

Third, the record demonstrates that Petra disclosed its intent to seek an additional CM fee and reimbursable salary expenses prior to providing the additional services. Petra fully complied with its contractual obligations.

## **2. BACKGROUND**

This case turns on a few clear contractual provisions set against a simple factual background. When the City retained Petra as its Construction Manager, the City was contemplating a \$12.2 million City Hall building. Petra and the City agreed to Petra's compensation in three separate places in the Construction Management Agreement. First, the City and Petra agreed in Paragraph 6.1 on a CM fee of \$574,000. Second, the City and Petra

agreed in Paragraph 6.2 that if the Project was to change in certain ways—for example, if the Project Budget were to increase—Petra would recoup its salary costs incurred in furtherance of these changes, in addition to its fee. Third, and most importantly, the City and Petra agreed in Paragraph 7 that if Petra’s services were “materially affect[ed]” by changes to the Project, Petra would be entitled to an “equitable adjustment” in its CM fee. The changes listed in Paragraph 7 include a “[s]ignificant change to the Project, including, but not limited to size, quality, complexity, Owner’s schedule, budget or procurement.” This provision is particularly important in light of the fact that these types of agreements are signed at the very earliest stages of a project. It provides a mechanism to compensate the construction manager if the scope of the job initially agreed upon expands and leads to more work than initially contemplated when the parties agreed to the initial fee.

The scenario envisioned by Paragraph 7 is precisely what happened in this case. The Meridian City Council, in their desire to build a state-of-the-art City Hall that would last 200 years, increased the size, quality, complexity, and the budget of the Project. What was initially conceived as a 12.2 million dollar building ended up costing in excess of 20 million dollars, due to the constantly evolving vision of the Meridian City Council. Naturally, Petra sought an “equitable adjustment” in its fee as well as reimbursement for increased salary costs under Paragraph 6.2.2. Petra notified the City of its intent to do so as soon as the scope of the Project had evolved to the point that there was “[s]ignificant change to the Project.” Petra repeatedly disclosed its intent to rely on Section 7 in order to be adequately compensated for its efforts.

As the Court is well aware, the City essentially takes a position in this case that it was unaware of Paragraph 7. The City takes the position that it could dramatically increase the scope, size, and complexity of the Project, but still only owe Petra \$574,000. The City takes the position that it can write out of the contract the equitable adjustment it agreed to in Paragraph 7. In other words, the City, in an apparent new sense of thriftiness, believes it can obtain Petra's services near half-price.

Rather than directly address this simple contractual obligation, the City has thrown up a variety of technical arguments. Here, in the present Motion, the City argues it did not receive timely notice of Petra's claim. As discussed below, this argument lacks merit.

### **3. LEGAL ANALYSIS**

#### **3.1 Contrary to the City's argument, Petra complied with all applicable notice requirements.**

The City argues Petra failed to give notice of its "claim" within 21 days of the first appearance of the basis for its claim. The City argues such notice was required by the Construction Management Agreement. Based on this faulty premise, the City goes back in time and attempts to locate the very first moment Petra should have known that, due to the increased cost of the Project, it would be entitled to an increase in its CM fee. The City contends at that very first moment, Petra had 21 days to submit a written notice of "claim" to the Office of the City Clerk and the City Attorney's Office. Because Petra failed to do so, its "claim" is barred. The City is incorrect. The City's interpretation of the Construction Management Agreement contradicts its plain meaning, is contrary to the use of the term "claim" in the construction industry, is at odds with the parties' mutual interpretation of the term as evidenced by their

course of conduct, and is not in conformance with the definition of “claim” in Idaho Code § 6-902.<sup>1</sup>

“The interpretation of a contract begins with the language of the contract itself.” *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007) (quoting *Independence Lead Mines Co. v. Hecla Mining Co.*, 143 Idaho 22, 26, 137 P.3d 409, 413 (2006)). If contract terms are “reasonably susceptible to conflicting interpretations, then the agreement is ambiguous.” *First Sec. Bank of Idaho, N.A. v. Murphy*, 131 Idaho 787, 791, 964 P.2d 654, 658 (1998). Interpreting an ambiguous contract is reserved for the trier of fact. *Id.* But “where contract terms are clear and unambiguous,” their interpretation is a question of law for the court. *Id.*

The City’s argument contradicts the plain and unambiguous meaning of the Construction Management Agreement by including a change order within the meaning of a “claim.” The term “claim” does not encompass a mere change order. Paragraph 8.1 states: “In the event that ***any claim, dispute or other matter in question*** between Owner and Construction Manager arising out of or related to this Agreement or the breach hereof (a ‘Claim’), Owner and Construction Manager shall first endeavor to resolve the Claim through direct discussions.” (Emphasis added.)

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<sup>1</sup> Paragraph 6-902(7) provides: “Claim” means any written demand to recover money damages from a governmental entity or its employee which any person is legally entitled to recover under this act as compensation for ***the negligent or otherwise wrongful act or omission*** of a governmental entity or its employee when acting within the course or scope of his employment. [Emphasis added.] The City did not refuse to pay Petra’s Change Order No.2 until February 24, 2009. That is the date of the City’s wrongful conduct. Prior to February 24, 2009, the City had requested additional information regarding Change Order No. 2. Neither Petra’s submission of Change Order No. 2, nor the City’s request for additional information was wrongful.

Under the Construction Management Agreement, a claim must be initiated by written notice and the burden of substantiating the claim is on the party making it.<sup>2</sup> The parties shall continue to perform under the Construction Management Agreement pending resolution of the claim. In order to assist the City in evaluating a claim, written notice of the claim must be submitted no later than 21 calendar days “after the event or the first appearance of the circumstances giving rise to the Claim.” Paragraph 8.2 requires claims to be addressed in mediation first and details the mediation process. The term “claim” does not appear anywhere outside of paragraph 8.

As the above provisions demonstrate, the term “claim” applies in the context of a dispute. This is first apparent from the phrase “claim, dispute or other matter in question” being abbreviated as a “Claim.” Under the canon of construction *ejusdem generis*, when a general word or phrase precedes or follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed. Consequently, a matter is not a claim until it is disputed. This comports with the standards in the construction industry that a change order is not a claim until it is denied and then pursued.

To borrow another principle of construction, *noscitur a sociis*, “words are known by the company they keep.” *State v. Richards*, 127 Idaho 31, 38, 896 P.2d 357, 364 (Ct. App. 1995). The meaning of the term “claim” is informed by the content of this list, which shows that the meaning of “claim” is related to “dispute” and “matter in question.” This meaning is further evidenced by the rest of paragraph 8. In particular, paragraph 8 requires the parties to continue

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<sup>2</sup> Affidavit of Gene Bennett dated April 7, 2010 (“Bennett April 7 Affidavit”) at ¶ 8, Exh. A.



performing their duties under the Construction Management Agreement pending resolution of the claim. And, all “claims” are subject to mediation. The entire thrust of paragraph 8 indicates that a claim arises when the parties are in a dispute implicating rights and obligations under the Construction Management Agreement.

Therefore, the City is incorrect in defining Petra’s Change Order No. 2 as a “claim” for an increased fee and placing it under the purview of paragraph 8 for purposes of the 21-day notice requirement. Rather, Change Order No. 2 was initiated pursuant to paragraphs 6 and 7 of the Construction Management Agreement. It was only when the City denied Petra’s request on February 24, 2009 that Petra had a claim within the meaning of paragraph 8 because it was not until the City denied Petra’s request that the parties had “claim, dispute, or other matter in question.” Then, Petra had an obligation to submit written notice within 21 days, which Petra did.<sup>3</sup>

The City’s entire notice argument is premised on this fundamentally erroneous interpretation of the Construction Management Agreement. Therefore, the City’s lengthy attempt in pages 6 through 11 of its *Memorandum* to ascertain the very first moment Petra could sense it may have a basis for an increased CM fee is irrelevant.

Further, the City’s interpretation of the term “claim” is at odds with its use in the industry. As Richard Bauer details in his affidavit, under standards applicable to contractors and

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<sup>3</sup> Affidavit of Thomas G. Walker dated April 29, 2010 (“Walker April 29 Affidavit”), filed in support of Petra’s Motion for Summary Judgment, at ¶ 5, Exh. A.

construction managers, a change order request does not become a claim until it is denied by the owner.<sup>4</sup>

Not only is the City's interpretation of the plain and unambiguous terms of the Construction Management Agreement erroneous, it contradicts the common interpretation both parties gave to the term "claim." To the extent the Court considers it ambiguous, whether a change order for an increased CM fee is a claim under paragraph 8, the parties' common interpretation controls. If ambiguous terms in a contract have been interpreted and acted upon by the parties, a court should weigh this common interpretation in interpreting the meaning of the disputed term. *Mountainview Landowners Co-op, Ass'n v. Cool*, 142 Idaho 861, 865, 136 P.3d 332, 336 (2006) ("The conduct of the parties to a contract and their practical interpretation of it is an important factor when there is a dispute over its meaning"); *J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 614, 167 P.3d 748, 751 (2006) (noting the relevance of the "construction placed upon [an ambiguous term] by the contracting parties as shown by their conduct or dealings").

Again, the City is attempting to interpret Change Order No. 2 as a "claim" subject to the provisions of paragraph 8, including the 21-day notice requirement. The City does not mention that it approved Change Order No. 1.<sup>5</sup> Petra submitted Change Order No. 1 for an increase in its CM Fee on September 14, 2007.<sup>6</sup> The basis for the fee request was the discovery and removal of contaminated and unsuitable soils.<sup>7</sup> The extent of this problem was discovered sometime prior to

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<sup>4</sup> Affidavit of Richard Bauer ("Bauer Affidavit") dated Sept. 13, 2010 at ¶ 45.

<sup>5</sup> Affidavit of Gene Bennett dated Sept. 13, 2010 ("Bennett Sept. 13, 2010 Affidavit") at ¶ 111.

<sup>6</sup> Affidavit of Gene Bennett dated April 7, 2010 ("Bennett April 7, 2010 Affidavit") at Exh. Z.

<sup>7</sup> Bennett Sept. 13, 2010 Affidavit at ¶ 111.

March 5, 2007.<sup>8</sup> Under the City's interpretation of a "claim" under the Construction Management Agreement, Petra would have been required to submit written notice of its CM fee request within 21 days of being informed of the extent of the contaminated and unsuitable soils and realizing that this might be something that may result in an increase in its CM fee. Not only is such an approach illogical, the record is clear that the parties did not treat Petra's first request for a CM fee increase as a claim under paragraph 8. After Petra submitted its CM fee request in Change Order No. 1 on September 14, 2007, the City paid the additional CM fee.<sup>9</sup> No one from the City invoked paragraph 8 and the 21-day notice requirement. No one from the City or Petra referenced paragraph 8. The parties' common interpretation of how a CM fee request was treated was that paragraphs 6 and 7, not paragraph 8, governed.<sup>10</sup>

Finally, the City's position is not in conformance with the definition of "claim" in Idaho Code § 6-902. Paragraph 6-902(7) provides: "Claim" means any written demand to recover money damages from a governmental entity or its employee which any person is legally entitled to recover under this act as compensation for *the negligent or otherwise wrongful act or omission* of a governmental entity or its employee when acting within the course or scope of his employment." I.C. 6-902 (7)(emphasis added). The City did not refuse to pay Petra's Change Order No. 2 until February 24, 2009. That is the date of the City's wrongful conduct. Prior to February 24, 2009, the City had only requested additional information regarding Change Order

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<sup>8</sup> Bennett April 7, 2010 Affidavit at Exh. Z.

<sup>9</sup> Bennett Sept. 13, 2010 Affidavit at ¶ 111.

<sup>10</sup> Bennett April 7, 2010 Affidavit at Exh. Z.

No. 2. Neither Petra's submission of Change Order No. 2, nor the City's requests for additional information was wrongful.

Therefore, the notice requirements of paragraph 8 were not triggered until February 24, 2009, when the City denied Petra's request for an increased CM fee.<sup>11</sup> Petra complied with the 21-day notice requirement.<sup>12</sup> The City's Motion for Summary Judgment is premised on this lack-of-timely-notice argument, and consequently should be denied.

**2.1 Further, the City is estopped from denying Petra's CM fee request because Petra allegedly failed to request it in a timely manner.**

The City is incorrect in arguing that Petra failed to comply with the Construction Management Agreement and has no right to its earned CM fee. As noted above, the City's interpretation of the term "claim" is erroneous. Additionally, equitable principles prevent the City from even taking the position that Petra failed to comply with the timeliness requirements of the CMA and is not entitled to its earned CM fee.

The doctrine of quasi-estoppel bars the City from claiming Petra's request for a CM fee was not timely and should be denied. Quasi-estoppel "has its basis in acceptance of benefits." *Mitchell v. Zilog*, 125 Idaho 709, 715, 874 P.2d 520, 526 (1994). This doctrine prevents one party "from asserting to another's disadvantage a right inconsistent with a position previously taken by him or her." *Id.* The doctrine also applies when the party to be estopped has gained an advantage from its first position. *Id.* For quasi-estoppel to apply, it must be unconscionable for the party to be estopped to "maintain a position inconsistent with one in which he acquiesced in

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<sup>11</sup> Bennett Sept. 13, 2010 Affidavit at ¶ 114.

<sup>12</sup> Walker April 29, 2010 Affidavit ¶5, Exh. A.

or of which he accepted a benefit.” *Id.* (citing *KTVB, Inc. v. Boise City*, 94 Idaho 279, 281, 486 P.2d 992, 994 (1971)). It is an equitable doctrine based on the principle “that a person, with full knowledge of the facts, shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another.” *KTVB*, 94 Idaho at 281, 486 P.2d at 994. Quasi-estoppel is as a “broadly remedial doctrine, often applied ad hoc to specific fact patterns.” *Keese v. Fetzek*, 111 Idaho 360, 362, 723 P.2d 904, 906 (1986).

A simple factual background demonstrates the applicability of this doctrine. It is undisputed that as of August 2007 the City was aware of Petra’s intent to seek an additional CM fee.<sup>13</sup> The City was also aware that Petra had not yet earned this fee request based on the status of the Project at the time.<sup>14</sup> The City was aware of Petra’s interpretation of the Construction Management Agreement and how it calculated its CM fee requests, particularly because it had approved Change Order No. 1.<sup>15</sup> The City said nothing.<sup>16</sup> The City did not take issue with anything about Change Order No. 2 until May 29, 2008, when it requested additional information but did not deny the request.<sup>17</sup> More importantly, the City did not deny Petra’s CM fee request until February 24, 2009.<sup>18</sup>

The key is recognizing that when Petra made clear to the City that it intended to seek an additional CM fee, Petra had not yet earned the fee. The City waited in silence until Petra had provided the services and earned the fee and then denied it. The City accepted the benefit of

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<sup>13</sup> Bennett Sept. 13, 2010 Affidavit at ¶ 105.

<sup>14</sup> *Id.* at ¶ 105.

<sup>15</sup> *Id.* at ¶ 106.

<sup>16</sup> *Id.* at ¶ 114-15.

<sup>17</sup> Bennett May 5, 2010 Affidavit at ¶123, Exh. 14.

<sup>18</sup> Bennett Sept. 13, 2010 Affidavit at ¶114.

Petra's services in bringing the Project to completion. Quasi-estoppel can "arise when a party **who has a duty to speak** fails to do so and thereby produces an advantage for himself, or a disadvantage for someone else, which is unconscionable." *Lupis v. Peoples Mortg. Co.*, 107 Idaho 489, 491, 690 P.2d 944, 946 (1984) (emphasis added). The City has pointed repeatedly to language in the Construction Management Agreement indicating that the parties entered into a relationship of "trust and confidence." But more on point is Paragraph 3.2, Owner's Duties: "If Owner learns of any . . . errors, omissions, or inconsistencies in the services of Construction Manager, and in the further event that Construction Manager does not have notice of the same, Owner shall inform Construction Manager."

As evidenced from the City's current position in this litigation, the City believed Petra was mistaken about its entitlement to an equitable adjustment in its CM fee. Instead of promptly informing Petra of its alleged error and perhaps reaching a negotiated agreement, the City waited until Petra had expended its efforts and money for the benefit of the City and earned the fee in bringing the Project to timely completion. Then the City denied Petra's request. The bottom line is that whether the duty is created by contract or whether it is the duty of good faith and fair dealing inherent in every contract,<sup>19</sup> the City had a duty to promptly speak up if it intended to deny Petra's CM fee request. The first elements of quasi-estoppel are met.

Additionally, to now allow the City to go back in time and assert that Petra was not timely in asserting its claim, after Petra completed the Project and earned the fee, is unconscionable. If the City disagreed with Petra's position that it was owed an additional CM

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<sup>19</sup> *Taylor v. Browning*, 129 Idaho 483, 490, 927 P. 2d 873 (1996).

fee, it should have raised the issue immediately. Instead, in what can only be considered a deliberate strategy, the City stayed silent until the Project was completed. Obviously, the City now disputes that it owes Petra the additional CM fee. What is unconscionable is that it did not raise this issue promptly, but instead allowed Petra to go forward and finish its work managing the Project. Even more troubling, after waiting months to deny the CM fee request, the City is now asserting the CM fee request is not timely. The unconscionability element of quasi-estoppel met.

Therefore, the doctrine of quasi-estoppel bars the City from asserting that it does not owe Petra an additional CM fee due to the timing of Petra's request. At a minimum, there is an issue of material fact that precludes summary judgment.

**2.2 Petra complied with paragraph 6.2.2 and is entitled to its claimed reimbursable expenses.**

The City argues that Petra's alleged failure to "track the number of hours in furtherance of the change" is a condition precedent that excuses the City's obligation to reimburse Petra. The City is incorrect.

First, as a factual matter, Petra complied with this provision.<sup>20</sup> Exhibit 513 attached to Gene Bennett's affidavit contains a detailed chart comparing the actual hours spent managing the Project versus the negotiated amount.<sup>21</sup> This chart was provided to the City in October of 2008.<sup>22</sup> Petra in fact did track the hours spent in furtherance of the changes in the Project due to

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<sup>20</sup> Bennett April 7, 2010 Affidavit at Exh. Q.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

“size, complexity, and budget.”<sup>23</sup> The May 3, 2010 Revision #1, which was sent to the City’s counsel because the parties were in litigation, provides additional clarity.<sup>24</sup> But, the undisputed fact is that the hours were in fact tracked and submitted to the City, and the documents were received October 3, 2008.<sup>25</sup> Like the Pac-West invoice fraud allegation, the City again seizes on a document in the record, and without taking the time to analyze it, makes an allegation.

Second, as a matter of contract interpretation, the City’s reading of the Construction Management Agreement gives paragraph 6.2.2 a meaning is inconsistent with the parties’ intent and impossible to carry out. The City is asking the Court to adopt its interpretation of paragraph 6.2.2 in a vacuum without addressing the contract as a whole in light of the surrounding facts and circumstances.

Paragraph 6.2.2 states:

If the size (i.e. 80,000 square feet), complexity (i.e., four story, surface parking), Owner’s schedule (i.e. six months Preconstruction Phase Services, eighteen months Construction Phase Services), Project Budget (i.e., \$12,200,000.00), procurement method (i.e., no long lead time and/or expedited materials), and/or bidding process (i.e., two bid packages, no rebids) materially changes, Owner and Construction Manager agree that the not-to-exceed limits set forth below shall be adjusted up or down accordingly based upon the actual number of hours worked in furtherance of the change by the Project Manager, Project Engineer, Project Superintendant, and Project Foreman.

In interpreting any particular provision of a contract, the “entire agreement must be viewed as a whole” to determine the mutual intent of the parties. *St. Clair v. Krueger*, 115 Idaho

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<sup>23</sup> *Id.*

<sup>24</sup> Ted Baird states in his affidavit that he has never seen this Revision # 1 sent on May 3, 2010. Petra’s counsel sent this to counsel for the City as the parties were in litigation. In any event, a similar chart was provided in October of 2008.

<sup>25</sup> Bennett April 7, 2010 Affidavit at Exh. Q.



702, 705, 769 P.2d 579, 582 (1989)). “When reasonably practical, contracts are to be interpreted in a manner that makes them reasonable and capable of being carried into effect . . . .” 17A Am. Jur. 2d *Contracts* § 338. An “interpretation should be adopted which, under all the circumstances of the case, ascribes the most reasonable, probable, and natural conduct to the parties.” *Id.*

Paragraph 6.2.2 does not require Petra to supply the level of detail as the City alleges. It would be impossible to correlate each moment of an employee’s time spent in furtherance of each of the hundreds of decisions that were made on a daily basis regarding the changes in size, complexity and budget.<sup>26</sup> As Petra’s expert explains, “the work under [Change Order No. 2] could not be separated from the original contract work.”<sup>27</sup> Furthermore, “[t]here was no point in the project when Petra or the City could say the project described in the contract was complete and Petra need authorization to move forward on the work in proposed Change Order No. 2.”<sup>28</sup> Rather, the most reasonable interpretation of paragraph 6.2.2 is that Petra provide its total hours spent over and above the negotiated hours in the contract.<sup>29</sup> As noted above, Petra complied with this provision.<sup>30</sup>

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<sup>26</sup> Bennett Sept. 20, 2010 Affidavit at ¶ 25.

<sup>27</sup> Bauer September 13, 2010 Affidavit, Exh. 504, Lemley Report, pg 12.

<sup>28</sup> *Id.*

<sup>29</sup> Bennett Sept. 20, 2010 Affidavit at ¶¶ 24-28.

<sup>30</sup> Bennett April 7, 2010 Affidavit at Exh. Q.

**2.3 The City is estopped from asserting it never gave approval to Petra before Petra earned its CM fee. The parties modified this aspect of the Construction Management Agreement.**

The City also argues that Petra's claim is barred because it failed to obtain the City's approval prior to providing the claimed services under Change Order No. 2. This argument is based on a revisionary version of the facts.

As the record reflects, the City never followed this particular timing with regard to change orders.<sup>31</sup> For example, Change Order No. 1 was issued in September of 2007 even though the work had already been completed in May of 2007.<sup>32</sup> It is contrary to the City's conduct to now insist on compliance with this particular provision when it never did during the course of the Project. Without repeating the analysis of waiver, the facts are such that the City waived the right to take this position.

In sum, there was never a practice of approving change orders prior to the work being done. The City and Petra modified this aspect of the Construction Management Agreement. Petra is estopped from now attempting to assert strict compliance with this term as written. At a minimum, there is a genuine issue of material fact that precludes summary judgment.

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<sup>31</sup> Bennett Sept. 20, 2010 Affidavit at 30.

<sup>32</sup> *Id.*

**4. CONCLUSION**

Petra respectfully requests the Court to deny the City's Motion for Summary Judgment.

DATED: September 20, 2010.

**COSHO HUMPHREY, LLP**

By: 

THOMAS G. WALKER

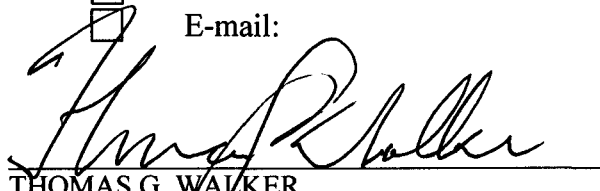
Attorneys for Defendant/Counterclaimant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on 20<sup>th</sup> day of September, 2010, a true and correct copy of the within and foregoing document was served upon:

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Trout Jones Gledhill Fuhrman, P.A.  
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P.O. Box 1097  
Boise, Idaho 83701

<input type="checkbox"/>	U.S. Mail
<input checked="" type="checkbox"/>	Hand Delivery
<input type="checkbox"/>	Overnight Courier
<input type="checkbox"/>	Facsimile:
<input type="checkbox"/>	E-mail:

  
THOMAS G. WALKER

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, AN IDAHO  
MUNICIPAL CORPORATION,

Plaintiff,

v.

PETRA, INCORPORATED, AN IDAHO  
CORPORATION. ,

Defendant.

Case No. CV OC 09-07257

**PETRA'S OPPOSITION TO THE CITY OF  
MERIDIAN'S MOTION IN LIMINE RE:  
EXPERT TESTIMONY OF JACK K.  
LEMLEY;  
PETRA'S OPPOSITION TO THE CITY OF  
MERIDIAN'S MOTION IN LIMINE RE:  
EXPERT TESTIMONY OF BENNETT.  
COUGHLIN, AND FRANK**

Petra Incorporated submits this Memorandum of Law in support of its opposition to the City of Meridian's Motion in Limine Re: Expert Testimony of Jack K. Lemley and in support of its opposition to the City's Motion in Limine Re: Expert Testimony of Bennett, Coughlin, and Frank.

**1. Motion in Limine Re: Jack Lemley**

The City argues that Jack Lemley's opinion should be excluded at the trial in this matter because the City contends his opinion is collective or collaborative. The City's Motion should be denied.

As a matter of background for the Court, Petra retained two experts for this case, Jack Lemley and Richard Bauer. Jack Lemley submitted an affidavit on April 30, 2010 containing his opinion as to the Project and Petra's compliance with the standard of care. This affidavit is the focus of the City's present Motion in Limine. Petra also disclosed a report produced by Mr. Lemley's firm back in June of 2010. On September 13, 2010, Petra filed the Affidavit of Richard Bauer, which references the Lemley Report, but contains Mr. Bauer's independent analysis and opinions

The City incorrectly characterizes Mr. Lemley's opinion as collaborative, an assimilation of the Lemley firm's collective work, and opines that Mr. Lemley is just a "conduit." But reading his affidavit, Mr. Lemley plainly states:

Considering the foregoing, it is my opinion within a reasonable degree of professional certainty that Petra exercised ordinary and reasonable care with the same degree of professional skill, diligence and judgment as is customary in this community among construction managers performing work for projects of a size, scope and complexity similar to the Project.<sup>1</sup>

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<sup>1</sup> Affidavit of Jack K. Lemley dated April 30, 2010 at ¶15.

Mr. Lemley also states: “My opinions stated herein are made with reasonable professional certainty, and I actually hold these professional opinions.”<sup>2</sup> The City appears to take issue with the fact that in arriving at his opinions, Mr. Lemley was assisted by various employees of Lemley International, including Mr. Bauer, in conducting interviews and collecting and reviewing documents. The City argues “Mr. Lemley’s expert opinion is admittedly, to some degree, in reliance upon the interviews of various individuals conducted by others as other individuals review of documents and sites.”<sup>3</sup>

Based on the fact that Mr. Lemley may have relied on other sources to arrive at his opinion, the City incorrectly deduces the opinion Petra seeks to use is that of a combined entity. Rather, both of Petra’s experts, Mr. Lemley and Mr. Bauer, hold independent opinions and refer to a report generated by Mr. Lemley with the assistance of Mr. Bauer and other employees of his firm. Messrs. Lemley and Bauer’s separate affidavits demonstrate they each hold independent opinions. Nothing precludes an expert from relying on other sources in arriving at his opinion.

Mr. Lemley, like any expert would in a complex case, relied on a number of sources in reaching his opinion: treatises, documents, reports, interviews, and so forth. This is expressly contemplated by the Rule 703, which states in relevant part:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

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<sup>2</sup> *Id.* at 14.

<sup>3</sup> Plaintiff’s Memorandum dated September 13, 2010 at p. 2

I.R.E. 703. The Idaho Supreme Court has interpreted this Rule:

The trial court, in its discretion, may allow an expert to render his opinion based in part upon hearsay or other inadmissible evidence, as long as the expert testifies as to the specific basis of his opinion and reaches an opinion through his own independent judgment.

*Egbert*, 125 Idaho at 680, 873 P.2d at 1334 (quoting *Doty v. Bishara*, 123 Idaho 329, 848 P.2d 387 (1992)). Nothing prohibits an expert from relying on an interview conducted by someone else, or even a document or report created by someone else. This is commonplace among expert witnesses. This conduct does not convert the expert testimony into the testimony of an “entity,” as the City claims.

Furthermore, nothing prevents an expert from relying on the opinions of other experts, just as an expert can rely on data, reports, treatises, and so forth. This type of reliance does not create a single collaborative opinion. The Idaho Supreme Court has stated “Nothing in Idaho law prevents experts from consulting each other or from holding the same opinion.” *Edmunds v. Kraner*, 142 Idaho 867, 874, 136 P.3d 338, 345 (2006). In fact, this very objection has been addressed and dismissed by courts in other jurisdictions. “Under Rule 703, an expert’s testimony may be formulated by the use of facts, data and *conclusions of other experts*.” *Asad v. Continental Airlines, Inc.*, 314 F. Supp. 2d 726, 740 (D. Ohio 2004) (emphasis added) (citing *Barris v. Bob’s Drag Chutes & Safety Equip., Inc.*, 685 F. 2d 94, 102 n. 10 (3<sup>rd</sup> Cir. 1982)). Provided the expert is not merely repeating the other expert’s opinion, he may testify.

Here, Mr. Lemley is not merely a conduit for another expert or for other testimony. Mr. Bauer is not merely a conduit for another expert. Both have formed their own independent

opinions. Their opinions may be formed in part on interviews conducted by others within Mr. Lemley's firm. Mr. Bauer and Mr. Lemley may rely on the same reports and are free to agree in their opinions. The City can on cross-examination inquire as to the bases for their opinions. "Trial courts have broad discretion in deciding whether to admit expert testimony." *Egbert v. Idaho State Ins. Fund*, 125 Idaho 678, 680, 873 P.2d 1332, 1334 (1993). The City has offered no basis for the exclusion of Mr. Lemley (or Mr. Bauer).

## **2. Motion in Limine Re: Bennett, Coughlin, and Frank**

The City also requests the Court to issue an order precluding Mr. Bennett, Mr. Coughlin, and Mr. Frank from providing expert testimony at trial in this matter. The Court should deny the City's request.

The City's Motion provides an incomplete background. Petra's deadline to disclose expert witnesses was September 15, 2010. Petra made a full disclosure of Bennett, Coughlin, and Frank (and John Quapp) on September 14, 2010, in compliance with the Court's Scheduling Order and Rule 26.<sup>4</sup> Each of these individuals is eminently qualified to give expert testimony in this case. Each of them has decades of experience in the construction industry. Nothing prohibits a person from serving both as a fact witness and an expert witness. When appropriate, each of them can not only testify as to whether Petra met the standard of care as defined in the Construction Management Agreement, but with the proper foundation, can also opine as experts on the standard of care in the industry.

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<sup>4</sup> *Petra Incorporated's Second Disclosure of Expert Witnesses* dated September 14, 2010.




**3. Conclusion**

Petra respectfully requests the Court deny both of the City's Motions.

**COSHO HUMPHREY, LLP**

DATED: September 20, 2010.

By:

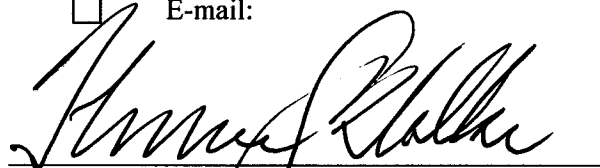
  
THOMAS G. WALKER  
Attorneys for Defendant/Counterclaimant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 20<sup>th</sup> day of September, 2010, a true and correct copy of the within and foregoing document was served upon:

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Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

<input type="checkbox"/>	U.S. Mail
<input checked="" type="checkbox"/>	Hand Delivery
<input type="checkbox"/>	Overnight Courier
<input type="checkbox"/>	Facsimile:
<input type="checkbox"/>	E-mail:

  
THOMAS G. WALKER

S order 11/4/11

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 5

SEP 20 2010

CHRISTOPHER D. RICH, Clerk  
By CHELSIE PINKSTON  
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**KIM J. TROUT, ISB #2468**

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Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**PLAINTIFF'S MEMORANDUM IN  
OPPOSITION TO MOTION IN LIMINE  
TO EXCLUDE TESTIMONY AND  
DOCUMENTS BY MERIDIAN'S  
EXPERTS**

The Plaintiff City of Meridian (hereinafter referred to as the "City"), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., submits this Memorandum in Opposition to the Motion in Limine to Exclude Testimony and Documents by Meridian's Experts as filed by the Defendant, Petra Incorporated (hereinafter referred to as "Petra").

By its present motion, Petra seeks to strike the City's expert witnesses based on an alleged failure to provide a timely disclosure in accordance with this Court's scheduling order and Idaho Rule of Civil Procedure 26(b)(4). However, the record belies Petra's assertion. As Petra must concede, the City did in fact disclose its witnesses timely on or about July 28, 2010. For Petra to assert that the City's disclosures of its expert witnesses was limited solely to the identification

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION IN LIMINE TO EXCLUDE  
TESTIMONY AND DOCUMENTS BY MERIDIAN'S EXPERTS**

Page 1

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provided on that date would be to ignore the substantial record present in these proceedings wherein the City's experts have provided a disclosure of their opinion testimony well prior to the July 28, 2010 deadline date.

Petra's motion is little more than an effort to obtain relief to which it is neither entitled, nor justified, under the facts and procedural history of this case. Petra's motion lacks merit and should be summarily dismissed.<sup>1</sup>

### ARGUMENT

**1. Petra's Motion Should Be Summarily Dismissed For Its Failure To Not Only Certify, But In Fact Actually Engage, In A Good Faith Effort To Confer With The City Regarding Any Discovery Dispute It Believed Existed.**

Although couched as a motion in limine, Petra's motion is in fact a disguised discovery motion. This should be clear given Petra's submission of its written discovery propounded to the City which sought to impose disclosure obligations over and above those required by Idaho Rule of Civil Procedure 26(b)(4). Thus, to the extent that Petra's motion seeks to sanction the City via discovery sanctions afforded by I.R.C.P. 37, Petra's motion should be summarily denied for failure to comply with the meet and confer requirements of Idaho Rule of Civil Procedure 37(a)(2) which clearly and unequivocally imposes the following obligation on any party seeking sanctions for the violation of a discovery order:

The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

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<sup>1</sup> For reasons wholly inexplicable, Petra has determined to inject the issues in the case of *City of McCall v. Payette Lake Recreational Water & Sewer District*, Valley County Case No. 2005-352-C into this matter despite the fact that it concerns wholly disparate facts, i.e. a highly contentious case having origins back to at least 2002 and wherein litigation between the parties commenced in 2005. Moreover, it should be noted that the Memorandum Decision cited by Petra is currently under review via a motion for reconsideration. Petra's inclusion of the *City of McCall* matter should be wholly disregarded and seen for what it is – nothing more than Petra's attempt to secure relief to which it has no entitlement whatsoever by cloaking itself in the guise of another party to another proceeding.

Nowhere within Petra's Motion, the Affidavit of Thomas G. Walker, or its Memorandum in Support of its Motion is there any certification that Petra has made any demand for supplementation of any existing discovery request. Nor could it. Petra has failed to comply with the certification requirement of I.R.C.P. 37(a), the necessary precursor to an order thereby, and has failed to secure an order under I.R.C.P. 37(a), the necessary precursor to an order to exclude evidence as a sanction under I.R.C.P. 37(b)(2). As such Petra's motion must be denied.

**2. The Facts In The Record Evidence That The City Has Disclosed Its Expert Witnesses and Their Testimony to Petra In Like Manner As Petra Has Disclosed Its Witnesses to the City.**

In order to justify the relief it seeks in this matter, Petra has asked that this Court consider a ruling issued in another proceeding, involving another party, and consider only the disclosure filed with the Court by the City on July 28, 2010. However, what Petra wholly fails to disclose, and what is abundantly evident from the record in these proceedings is that the City had already fully disclosed the expert testimony of its expert witnesses well prior to July 28, 2010 disclosure deadline.

As this Court is aware from the briefing related to the City's Motion to Amend as well as the cross motions for summary judgment, the City has presented the Affidavits of Steven J. Amento, Laura Knothe, and Todd Weltner, all of whom have identified their background, their opinions, and the basis for those opinions. If Petra wishes to complain about disclosing expert witness testimony by way of reference to the affidavits of the experts already present in the proceeding, then Petra needs to have its own expert disclosures likewise stricken. As is evident from a review of the expert disclosures provided by Petra, Petra has itself disclosed its experts by way of reference to the

affidavits of those individuals already submitted in these proceedings. *See* Petra Incorporated's Disclosure of Expert Witnesses Dated August 12, 2010.<sup>2</sup>

It is against this backdrop that Petra's cases fail to support the result that it seeks in these proceedings. For example, in the case of *Radmer v. Ford Motor Company*, 120 Idaho 86, 813 P.2d 897 (1991), the trial court correctly excluded an expert witness from testifying at trial to a previously undisclosed theory of causation. In this case, Petra has the disclosures of the substance of the expert witnesses that the City intends to call as well as the basis for those opinions. Moreover, Petra is still in the process, as is the City, of conducting expert discovery by way of depositions. Petra's motion would be appropriately considered at trial if a City witness proffered a new, undisclosed opinion, but it cannot be used as a vehicle to prohibit the testimony of those opinions to which Petra has already been advised by way of the City's disclosures. *See also Clark v. Klien*, 137 Idaho 154, 45 P.3d 810 (2002) (trial court erred by allowing previously undisclosed expert to testify at trial); *Hopkins v. Duo-Fast Corp.*, 123 Idaho 205, 846 P.2d 207 (1993) (trial court did not err in permitting expert witness to present previously undisclosed expert testimony at trial where evidence showed that expert opinion was reached recently and not the result of sandbagging by the disclosing party); *Perry v. Magic Valley Regional Medical Center*, 134 Idaho 46, 995 P.2d 816 (2000) (trial court did not err in excluding video tape that was not produced in discovery despite presence of repeated demands for discovery and supplementation by moving party); *Fouche v. Chrysler Motors Corp.*, 103 Idaho 249, 646 P.2d 1020 (Ct. App. 1982) (trial court did not err in excluding auto mechanic from presenting expert testimony as to accident reconstructionist where he was not qualified to do so, nor designated as an expert witness on such a subject).

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<sup>2</sup> Moreover, Petra also fails to disclose to this Court that it currently has scheduled the depositions of the City's expert witnesses and to the extent those depositions have not yet been undertaken, Petra's motion is severely premature.

The evidence in the record, compared with the disclosures of experts similarly made by Petra, demonstrates that Petra's motion lacks merit and should be denied in its entirety.

### CONCLUSION

For the reasons stated, the City requests that this Court deny Petra's Motion in Limine to Exclude Testimony and Documents by Meridian's Experts.

DATED this 20<sup>th</sup> day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
Gourley, P.A.

By:   
Kim J. Trout  
Attorneys for Plaintiff

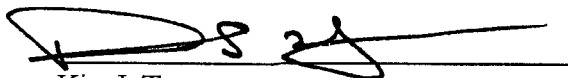
### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20<sup>th</sup> day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

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Direct Facsimile: (208) 639-5609

Hand Delivered  
U.S. Mail  
Fax  
Email

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Kim J. Trout

Sub order 11/4/11

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 5

SEP 20 2010

CHRISTOPHER D. RICH, Clerk  
By CHELSIE PINKSTON  
DEPUTY

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Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**PLAINTIFF'S MEMORANDUM IN  
OPPOSITION TO MOTION IN LIMINE  
TO EXCLUDE TESTIMONY AND  
DOCUMENTS REGARDING  
MERIDIAN'S CLAIMED DAMAGES**

The Plaintiff City of Meridian (hereinafter referred to as the "City"), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., submits this Memorandum in Opposition to the Motion in Limine to Exclude Testimony and Documents regarding Meridian's Claimed Damages as filed by the Defendant, Petra Incorporated (hereinafter referred to as "Petra").

By its present motion, Petra seeks to strike in its entirety the City's claim for damages in this matter based solely on the City's alleged failure to supplement certain discovery responses provided by the City. Moreover, Petra seeks to impose this draconian discovery sanction without even a single demand for supplementation, let alone seeking an order of this Court compelling further

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION IN LIMINE TO EXCLUDE  
TESTIMONY AND DOCUMENTS REGARDING MERIDIAN'S CLAIMED DAMAGES**

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disclosure, as clearly required by the discovery rules before such a motion can even be presented.<sup>1</sup>

Petra's motion lacks merit and should be summarily dismissed.

### **ARGUMENT**

**1. Petra's Motion Should be Summarily Dismissed for Its Failure to Not Only Certify, But In Fact Actually Engage, In A Good Faith Effort To Confer With The City Regarding Any Discovery Dispute It Believed Existed.**

Petra's motion should be summarily denied for the failure to comply with the meet and confer requirements of Idaho Rule of Civil Procedure 37(a)(2) which clearly and unequivocally imposes the following obligation on any party seeking sanctions for the violation of a discovery order:

The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

Nowhere within Petra's Motion, the Affidavit of Thomas G. Walker, or its Memorandum in Support of its Motion is there any certification that Petra has made any demand for supplementation of any existing discovery request. Nor could it. Petra has simply served discovery, made no demand for supplementation, filed no motion to compel discovery, and now seeks an order of this Court imposing the most severe sanction afforded a party under Rule 37(b).

In fact, Petra wholly neglects the fact that not only has it failed to certify, and actually conduct a good faith effort to resolve this dispute with the City, Petra has not even filed a motion under I.R.C.P. 37(a) and obtained an order thereby, which is the procedural precursor to the request for the sanction of the exclusion of evidence provided by I.R.C.P. 37(b). It is clear that in order to be entitled to any sanction provided for under I.R.C.P. 37(b)(2), the moving party must demonstrate

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<sup>1</sup> Given Petra's not too subtle citation to a Memorandum Decision entered in the case of *City of McCall v. Payette Water & Sewer District*, Valley County Case No. 2005-352-C, it is apparent that Petra hopes for this Court to enter similar relief despite the presence of wholly disparate facts, i.e. a highly contentious case having origins back to at least 2002 and a litigation between the parties commenced in 2005. Moreover, it should be noted that the Memorandum Decision cited by Petra is currently under review via a motion for reconsideration. Petra should concern itself more with the facts and circumstances of the case in which it is a party than attempt to thrust a separate unrelated proceeding into this matter.



that "a party ... fails to obey an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just ...". I.R.C.P. 37(b)(2). As the record will reflect, Petra has not moved for an order compelling the City to supplement its discovery responses nor obtained a Court order with regards to any such matter.

The rules of civil procedure do not contemplate the imposition of such a severe sanction based on a moving party's own willful refusal to utilize the tools within to resolve a point of controversy between the parties. Petra has failed to comply with the certification requirement of I.R.C.P. 37(a), the necessary precursor to an order thereby, and has failed to secure an order under I.R.C.P. 37(a), the necessary precursor to an order to exclude evidence as a sanction under I.R.C.P. 37(b)(2). As such Petra's motion must be denied.

**2. Even If This Court Were To Consider The Substance Of Petra's Motion, The Facts In The Record Evidence That Petra Is Fully Aware Of The Nature And Scope Of The City's Damages In This Matter.**

As detailed above, Petra's failure to comply with the procedural conditions precedent to seeking the relief sought by its instant motion prohibit further consideration of Petra's Motion. However, regardless of this fatal deficiency, Petra's motion is utterly without merit as Petra simply cannot in good faith assert that it has not received a disclosure of Meridian's evidence of damages. As counsel for Petra recently conceded at oral argument in this matter, the issues of this case have been briefed and presented until the cows come home. The City of Meridian has provided in the record affidavits, and in some cases multiple affidavits from Steven J. Amento, Laura Knothe, Todd Weltner, Keith Watts, Theodore W. Baird, and David Zaremba. As the Court is now familiar with these affidavits as a result of the pendency of the parties' cross motions for summary judgment and the City's motion for summary judgment, these affidavits provided multiple sources of detailed information of the facts and circumstances upon which the City asserts that the multiple breaches, errors, and omissions by Petra caused the City damages. Moreover, as Petra must concede these

individuals as well as multiple others, no less than thirteen by last count, are to be deposed by Petra in the next twenty days.

It is simply disingenuous for Petra to argue that it is unaware of the nature and scope of the City's damages. Just as it is disingenuous for Petra to point to the testimony of Steven Amento and Keith Watts as to the dollar value that the City has calculated as to its financial loss as a result of Petra's actions when neither of these individuals have ever been designated to provide such testimony. As the Affidavits from Mr. Amento make clear his purpose is limited solely to expert testimony as to the standard of care expected of a construction manager such as Petra, given Petra's express acceptance of a fiduciary relationship with the City. Likewise, Mr. Watts' Affidavits never once attempt to ascribe a dollar value to the City's loss. Petra cannot identify whatever witness it wants for whatever subject it desires and then complain when that individuals does not testify with regard to a matter he or she has not been designated to testify concerning.

In short, Petra seeks to obtain the very same relief afforded to another party, in another litigation, without even the slightest attempt to demonstrate that it is even remotely similarly situated. Petra's motion is without procedural or substantive basis and must be denied.

### CONCLUSION

For the reasons stated, the City requests that this Court deny Petra's Motion in Limine to Exclude Testimony and Documents Regarding Meridian's Claimed Damages.

DATED this 20<sup>th</sup> day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
Gourley, P.A.

By: 

Kim J. Trout  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 20<sup>th</sup> day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

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Kim J. Trout

FILED  
P.M. 3:00  
**SEP 21 2010**  
J. L. NAVARRO, Clerk  
By L. AMES  
DEPUTY

**KIM J. TROUT, ISB #2468**  
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Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**SECOND AMENDED NOTICE OF  
HEARING RE: PLAINTIFF CITY OF  
MERIDIAN'S MOTION TO DISMISS  
(IDAHO TORT CLAIMS ACT)**

**TO: THE ABOVE NAMED DEFENDANT AND ITS COUNSEL OF RECORD:**

PLEASE TAKE NOTICE, that the hearing on Plaintiff's Motion to Dismiss which was scheduled to be heard on Thursday September 16, 2010 will now be heard on **Monday September 27, 2010 at the hour of 1:30 p.m. before the Honorable Ronald J. Wilper.** The hearing is scheduled at the Ada County Courthouse located at 200 W. Front St., Boise, ID, 83702.

DATED this 21<sup>st</sup> day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.

By: \_\_\_\_\_

Kim J. Trout  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 21<sup>st</sup> day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

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\_\_\_\_\_  
Kim J. Trout

SEP 23 2010

CHRISTOPHER D. RICH, Clerk  
By CHELSIE PINKSTON  
DEPUTY

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Erika Klein (ISB 5509)  
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Attorneys for Defendant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
municipal corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
corporation.,

Defendant/Counterclaimant

Case No. CV OC 09-07257

REPLY MEMORANDUM IN SUPPORT OF  
PETRA'S MOTION IN LIMINE TO  
EXCLUDE TESTIMONY AND  
DOCUMENTS BY THE CITY'S EXPERTS

REPLY MEMORANDUM IN SUPPORT OF PETRA'S MOTION IN LIMINE  
TO EXCLUDE TESTIMONY AND DOCUMENTS BY THE CITY'S EXPERTS.

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Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its attorneys of record, submits this reply in support of its motion in limine to exclude testimony and documents by the City's experts.

Petra submits that simply referencing the affidavits of the proposed expert witnesses does not comply with Rule 26(b)(4)(A)(i) and the Court's Scheduling Order. Although an affidavit may serve as a "complete statement of all opinions to be expressed and the basis and reasons therefore," the affidavits submitted by the City do not meet these requirements. But, Rule 26 also mandates the disclosure of

the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

I.R.C.P. 26(b)(4)(A)(i).

In addition, Petra's Interrogatory No. 16 requested the following information:

Identify each and every person You expect to call as an expert witness at any hearing or at trial, stating in detail as to each such person: (a) full name, home address, business address and telephone number; (b) educational background; (c) experience in the matter to which he is expected to testify; (d) subject matter on which he is expected to testify; (e) substance of the facts and opinions to which he is expected to testify and a summary of the grounds for each opinion; and (f) manner in which such expert became familiar with the facts of this case.

Neither the affidavits submitted by the City nor its responses to Interrogatory No. 16 comes close to providing the required information regarding its experts.

1)  
REPLY MEMORANDUM IN SUPPORT OF PETRA'S MOTION IN LIMINE  
TO EXCLUDE TESTIMONY AND DOCUMENTS BY THE CITY'S EXPERTS

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Page 2

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The City's attempt to equate their inadequate expert witness disclosures with Petra's disclosure is misleading, as even a cursory glance at Petra's Expert Witness Disclosures demonstrate.<sup>1</sup> The City has not met the requirements of Rule 26 or the deadlines imposed by the Court's Scheduling Order.<sup>2</sup> In addition, the City has not responded fully and completely to Petra's Interrogatory No. 16. Consequently, the City's experts should be excluded from testifying at trial.

In the alternative, since the City has stated the affidavits of Steven J. Amento, Laura Knothe, and Todd Weltner constitute a "complete statement of all opinions to be expressed and the basis and reasons therefore," Petra requests that the Court limit the testimony of these experts to the opinions set forth in their respective affidavits.<sup>3</sup> Any opinion beyond the scope of these affidavits would be an undisclosed opinion and would prejudice Petra at trial. Any attempt to have these experts testify regarding matters outside the scope of their affidavits is not permitted by the Idaho Rules of Civil Procedure and would be highly prejudicial to Petra. Idaho law is clear in prohibiting the introduction of undisclosed theories at trial. *See, e.g., Clark v. Klein*, 137 Idaho 154, 156-59, 45 P.3d 810, 812-15 (2002); *Radmer v. Ford Motor Co.*, 120 Idaho 86, 89, 91, 813 P.2d 897, 899-902 (1991). Springing undisclosed expert testimony at trial is barred by

<sup>1</sup> See Petra Incorporated's Disclosures of Expert Witnesses dated August 12, 2010 and September 14, 2010.

<sup>2</sup> The City did submit a supplemental response to Petra's first set of interrogatories over a month later that included an attempt at supply some of the information required by Rule 26. The information provided was untimely under the Court's Scheduling Order. Furthermore, it does not constitute the level of disclosure required by Rule 26. Nothing contained in this untimely supplemental response changes the grounds for this Motion.

<sup>3</sup> In this regard, any attempt by the City in its tardy supplemental response to expand the basis of Amento's, Knothe's, or Weltner's disclosures should not be allowed. The City has ignored this Court's deadlines and should be held to the affidavits.



the rules because the opposing party is not provided an opportunity to adequately prepare to challenge the testimony. Therefore, Amento, Knothe and Weltner should be limited to only testifying as to matters disclosed in their respective affidavits.

Further, the City does not even contest that it has failed to comply with Rule 26 and the Court's Scheduling Order with regard to MTL, Ray Weatherholt, Neil Anderson, Leo Geiss, Lee Cotton, Jason Neidigh, Mike Simmonds, Steve Turney, and Tim Petshe.<sup>4</sup> The City only attempts to defend the disclosures of Amento, Knothe, and Weltner. Therefore, Petra requests that the court enter an order barring any proffered testimony from these nine persons, whose names were simply listed on "Plaintiff's Disclosure of Expert Witnesses" submitted July 28, 2010.

COSHO HUMPHREY, LLP

DATED: September 23, 2010.

By:

  
THOMAS G. WALKER  
Attorneys for Defendant/Counterclaimant

<sup>4</sup> As noted above, the City did submit a supplemental response to Petra's first set of interrogatories over a month later that included an inadequate attempt to provide some of the information required by Rule 26. The information provided was untimely under the Court's Scheduling Order. More importantly, the minimal information provided by the City regarding these nine "experts" fails to comply with Rule 26.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 23<sup>rd</sup> day of September, 2010, a true and correct copy of the within and foregoing document was served upon:

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THOMAS G. WALKER

SEP 23 2010

CHRISTOPHER D. RICH, Clerk  
By CHELSIE PINKSTON  
DEPUTY

Thomas G. Walker (ISB 1836)  
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Attorneys for Defendant, Petra Incorporated

## IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

## THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
municipal corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
corporation.,

Defendant/Counterclaimant

Case No. CV OC 09-07257

REPLY MEMORANDUM IN SUPPORT OF  
PETRA'S MOTION IN LIMINE TO  
EXCLUDE EVIDENCE OF DAMAGES

Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its attorneys of record, submits this reply in support of its motion in limine to exclude evidence of Petra's claimed damages.

Consistent with its strategy to conceal crucial facts from Petra, the City's response to Petra's motion in limine does not include a single substantive word about the theories, elements or amounts of the City's alleged damages. As of the date of the hearing on Petra's motion, it will be just 65 days before trial and more than 17 months after Meridian filed suit. It is unconscionable that, at this late date, Meridian has not disclosed the critical factual information Petra needs to defend against the City's damages claims despite Petra's extensive discovery efforts. Petra's efforts include interrogatories, requests for admission, requests for production of documents and depositions of Mayor Tammy DeWeerd, Council President Charlie Roundtree, Council Project Liaison Keith Bird, the City's Authorized Representative and Purchasing Agent Keith Watts, City Attorney William Nary, Assistant City Attorney Theodore W. Baird, Jr., and the City's three experts, Steven J. Amento, Laura Knothe and Todd Weltner. Consequently, Petra has not been able to prepare its defense against the City's undisclosed damages theories and is, therefore, severely prejudiced.

To date, the City has not supplemented very simple interrogatories.<sup>1</sup> For example, when asked by Petra to disclose its investigations into its claims and the findings, the City responded in relevant part:

At present, the findings to date indicate that Petra's conduct, both its actions, and its failures to act, are the cause of substantial, but yet to be quantified damages to the City of Meridian under the legal theories expressed in the Complaint.

In another interrogatory, Petra inquired into the legal and factual basis for the City's claims, and the City responded:

The body of law comprising contract law as applicable to the facts, and the law of torts as applicable to the facts supports the claims and defenses made by Meridian in this matter. The body of law comprising equitable principles supports the claims and defenses of Meridian in this matter.

Unless the City has not yet quantified its damages or determined what damage theories it intends to advocate at trial, these interrogatory answers are "no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." I.R.C.P. 26(e). In truth, it is simply not believable that the City has not yet determined the theories, elements or amounts of its alleged damages and identified specifically what Petra did or failed to do that caused the City to suffer damages. The City's intentional concealment has deprived Petra of the time it needed to respond.

---

<sup>1</sup> A copy of Meridian's responses to Petra's First Set of Interrogatories, Requests for Production and Requests for Admission is attached as Exhibit A to the Second Affidavit of Thomas G. Walker, dated August 25, 2010 and attached to Petra's Motion.

Further, as noted above, the City has never disclosed, via deposition or affidavit testimony, any significant detail regarding its damage claims. The only possible exceptions are scattered references to Petra's alleged failure to assess liquidated damages against Rule Steel, and possibly other prime contractors. Unanswered questions include whether the City intends on presenting damages evidence by expert or lay witnesses and whether it is seeking damages arising from the alleged defects, all of which are covered by warranties and which have not resulted in any out-of-pocket costs to the City. And if the City intends to seek damages arising from the alleged failure of Petra to seek liquidated damages, it has not disclosed how it has arrived at the conclusion that each prime contractor should have been held liable for liquidated damages. In other words, how much in liquidated damages does the City feel it was entitled to and how did the City arrive at the amount? The taxpayers of the City of Meridian and Petra have incurred more than \$1 million in legal costs and yet the answers to these crucial question are relegated to pure speculation.

The City's response to Petra's motion in limine attempts to gloss over the fact that it has failed to comply with its discovery obligations. First, the City contends Petra's motion in limine is a motion to compel. It is not. The Idaho Rules of Civil Procedure do not require a party to bring a motion to compel. The City's obligations to supplement under Rule 26 are clear and self-executing.

Second, the City argues that its damages claims and theories are set forth in the affidavits of Steven J. Amento, Laura Knothe, Todd Weltner, Keith Watts, Theodore W. Baird, Jr. and

David Zaremba. Then, inexplicably, the City goes on to state that neither Mr. Amento nor Mr. Watts has been designated to provide testimony on damages. Therefore, Petra is left with the affidavits of Weltner, Knothe, Baird, and Zaremba. It appears that the City intends to rely on these affidavits as meeting its disclosure requirements. This reliance by the City is plainly inadequate. These affidavits largely set forth opinions on Petra's alleged breaches. Again, with the possible exception of liquidated damages, there is nothing in these affidavits that comes close to being an adequate disclosure of the City's damage claims. These experts simply provide various opinions, i.e. "Petra failed to do cost controls;" "Petra failed to guard against defects;" "Petra failed to supervise," etc. The City has an obligation to disclose the theories, elements and amounts of the City's alleged damages and how Petra's alleged breaches caused the damages.

For example, if the City's claims are based upon the allegation that there are an insufficient number of plumbing cleanouts,<sup>2</sup> what did Petra do or fail to do to cause the deficiency and how much was the City damaged? This example is replicated numerous times throughout the Weltner, Baird, and Knothe affidavits. And in the Zaremba affidavit, the City seems to imply that the new City Hall building was foisted upon it unwillingly and through fraudulent representations. Petra cannot discern what evidence of damages, if any, is contained in the Zaremba affidavit.

---

<sup>2</sup> Affidavit of Todd Weltner dated July 2, 2010 at ¶ 23.

Lastly, if the City intends to rely on these affidavits as meeting its expert witness disclosure requirements under Rule 26, then Petra requests that the City be held to these disclosures. Any attempt to have its experts testify regarding the City's damages outside the scope of these affidavits is not permitted by the Rules and would be highly prejudicial to Petra. Idaho law is clear in prohibiting undisclosed theories to be introduced at trial. *See, e.g., Clark v. Klein*, 137 Idaho 154, 156-59, 45 P.3d 810, 812-15 (2002); *Radmer v. Ford Motor Co.*, 120 Idaho 86, 89-91, 813 P.2d 897, 899-902 (1991). Springing undisclosed expert testimony at trial is barred by the rules because the opposing party was not given time to adequately prepare to rebut the testimony. The City's experts, Amento, Knothe and Weltner, should be limited to the testimony disclosed in their affidavits.

Considering the trial date is imminent, and because Petra remains in the dark about the theories, elements and amounts of the City's alleged damages, the Court would be within its discretion to exclude evidence of the City's claimed damages at trial. The City's response to the present motion discloses nothing about its damages claims. The City's response demonstrates that it continues to "hide-the-ball." A party is under disclosure obligations during discovery that go beyond simply restating the claims that appear in the complaint.

Petra is not required to bend over backwards to extract a hint from the City about how exactly it was harmed by Petra. Idaho's Rules of Civil Procedure governing discovery share the same purpose as their federal counterparts. These Rules are "intended to insure 'proper litigation' by making the 'trial less a game of blindman's bluff and more a fair contest with the




basic issues and facts disclosed to the fullest practicable extent.” *Scott and Fetzer Co. v. Dile*, 643 F.2d 670, 674 (quoting *Goldman v. Checker Taxi Co.*, 325 F.2d 853, 855 (7th Cir. 1963)) (citations omitted).

Considering the foregoing, Petra requests the Court to exclude at trial all testimony and documents regarding Meridian’s claimed damages.

DATED: September 23, 2010.

COSHO HUMPHREY, LLP



THOMAS G. WALKER


Attorneys for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23<sup>rd</sup> day of September, 2010, a true and correct copy of the within and foregoing document was served upon:

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THOMAS G. WALKER

SEP 27 2010

J. DAVID NAVARRO, Clerk  
By \_\_\_\_\_ INGA JOHNSON  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

vs.

PETRA INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CVOC 09 07257

ORDER DENYING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

This matter came before the Court on Defendant Petra's Motion for Summary Judgment. On Thursday, September 16, 2010, the Court heard oral argument on the Motion for Summary Judgment, along with Plaintiff's Motion for Leave to file First Amended Complaint to add a claim for punitive damages, and both parties' multiple Motions to Strike made in conjunction with their respective motions. Kim Trout and Daniel Glynn appeared for the Plaintiff, and Thomas Walker appeared for the Defendant. The Court ruled from the bench denying Meridian's Motion to Strike certain affidavits submitted by Petra on September 13, 2010, and denying Petra's Motion to Strike Ted Baird's April 1, 2010, affidavit. At the conclusion of the hearing, the Court considered the Motion for Leave to Amend to add punitive damages, the Motion for Summary Judgment, and the

1 remaining Motions to Strike fully under advisement. This Order denies Defendant Petra's Motion  
2 for Summary Judgment.

### 3 **BACKGROUND**

4 In August 2006, the City of Meridian and Petra Incorporated entered into a Construction  
5 Management Agreement (CMA) under which Petra assumed the role of Construction Manager for  
6 Meridan's City Hall. In sum, the city alleges Petra was negligent in its duties and breached its duties  
7 under the CMA. In response, Petra counterclaims that Meridian breached the CMA and the  
8 covenant of good faith and fair dealing. Petra also alleges breach of an implied-in-fact contract and  
9 breach of an implied-in-law contract.  
10

### 11 **SUMMARY JUDGMENT STANDARD**

12 Idaho Rule of Civil Procedure 56(c) provides that summary judgment is "rendered  
13 forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any,  
14 show that there is no genuine issue as to any material fact and that the moving party is entitled to a  
15 judgment as a matter of law." *See also First Sec. Bank of Idaho, N.A. v. Murphy*, 131 Idaho 787,  
16 790, (1998). An adverse party may not simply rely upon mere allegations in the pleadings, but must  
17 set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(e); *see*  
18 *Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). The affidavits either  
19 supporting or opposing the motion must set forth facts that would be admissible in evidence and  
20 show that the affiant is competent to testify. *Id.*

21 To withstand a motion for summary judgment, the non-moving party's case must be  
22 anchored in something more than speculation; a mere scintilla of evidence is not enough to create a  
23 genuine issue of material fact. *Zimmerman v. Volkswagon of America, Inc.*, 128 Idaho 851, 854,  
24 920 P.2d 67, 69 (1996). Generally, liberal construction of the facts in favor of the non-moving  
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26

1 party requires the court to draw all reasonable factual inferences in favor of the non-moving party.  
2 *See Williams v. Blakley*, 114 Idaho 323, 324 (1988). If reasonable people could reach different  
3 conclusions or draw conflicting inferences from the evidence, the motion should be denied. *Friel v.*  
4 *Boise City Housing Authority*. 126 Idaho 484, 486 (1994).

5 However, when the Court sits as the trier of fact, rather than a jury, summary judgment may  
6 be appropriate despite the possibility of conflicting inferences, because the court alone will be  
7 responsible for resolving such conflicting inferences. *Riverside Development Co. v. Ritchie*, 103  
8 Idaho 515, 519 (1982); *see also Cameron v. Neal*, 130 Idaho 898, 900 (1997). In such an instance,  
9 “the judge is free to arrive at the most probable inferences to be drawn from uncontroverted  
10 evidentiary facts.” *Blackmon v. Zufelt*, 108 Idaho 469, 470 (Ct. App. 1985) (citing *Riverside*  
11 *Development Co.*, 103 Idaho at 519).

### 12 **PETRA’S MOTION FOR SUMMARY JUDGMENT**

13  
14 Petra moves the Court for summary judgment on the basis of fifteen (15) claims. These claims  
15 are supported by a statement of undisputed facts, a memorandum of law, and multiple affidavits. In  
16 response, Meridian filed a memorandum of law and multiple affidavits in opposition. As the trier of  
17 fact in this case, the Court is free to arrive at the most probable inferences to be drawn from the  
18 undisputed facts found in these documents.

19 Many of Petra’s claims state that it performed its responsibilities under the Construction  
20 Management Agreement (CMA) with the applicable standard of care and that “professionals hired by  
21 Meridian and [Meridian’s] own building inspectors” agree that Petra fulfilled its contractual duties.  
22 *Petra’s Motion for Summary Judgment* at 1-2. However, those claims are disputed by Meridian. The  
23 parties present dueling expert affidavit testimony as to the standard of care. *See Affidavit of Jack*  
24 *Lemley* at ¶ 15; *Affidavit of Steven Amento* at ¶ 47. Lay affidavit testimony presented by the parties as  
25  
26

1 to the completion of certain duties under the CMA is equally conflicted. The Court finds there  
2 remains a genuine issue of material fact as to whether Petra performed its responsibilities with the  
3 applicable industry standard of care.

4 Petra also asserts that "the course of performance of dealing by the parties amended and  
5 supplemented" the written CMA. *Petra's Motion* at 2. To illustrate this claim, Petra states that its fees  
6 for the management of the Soil Removal Change Order #1 and the East Parking Lot projects were  
7 each 4.7%, therefore, its fee above what was initially negotiated under the CMA should be 4.7%.  
8 Meridian argues the fee was fixed and that CMA ¶ 7 required Petra to seek approval from Meridian  
9 before performing any work that would incur additional fees if Petra expected to be paid an amount  
10 above what was initially negotiated under the CMA. After hearing oral argument on this and related  
11 motions, and after reviewing extensive affidavit testimony on this issue, the Court finds there remains  
12 a genuine issue of material fact as to how Petra's fee was to be determined.  
13

14 Petra's final six (6) claims relate to its counter-claims and alternative theories of recovery in  
15 this case. After studying all the evidence, and drawing the reasonable inferences it is allowed under  
16 Idaho law, the Court is persuaded that genuine issues of material fact remain concerning the claims  
17 made by Petra in its Motion for Summary Judgment, thus, Petra's Motion for Summary Judgment is  
18 DENIED.  
19

20 IT IS SO ORDERED.

21 Dated this 24 day of September, 2010

22  
23  
24   
25 \_\_\_\_\_  
26 Ronald J. Wilber  
DISTRICT JUDGE

CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 27 day of September, 2010, I caused a true and correct copy of the foregoing ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT TO ADD A CLAIM FOR PUNITIVE DAMAGES to be served by the method indicated below, and addressed to the following:

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J. DAVID NAVARRO  
Clerk of the District Court  
Ada County, Idaho

By INGA JOHNSON  
Deputy Clerk

SEP 27 2010

J. DAVID NAVARRO, Clerk  
By INGA JOHNSON  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

vs.

PETRA INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CVOC 09 07257

ORDER DENYING PLAINTIFF'S  
MOTION FOR LEAVE TO  
FILE A FIRST AMENDED  
COMPLAINT TO ADD A  
CLAIM FOR PUNITIVE  
DAMAGES

This matter came before the Court on Plaintiff Meridian's Motion for Leave to File a First Amended Complaint to add a claim for punitive damages. On Thursday, September 16, 2010, the Court heard oral argument on the Motion for Leave to Amend, along with Defendant Petra's Motion for Summary Judgment, and both parties' multiple Motions to Strike made in conjunction with their respective motions. Kim Trout and Daniel Glynn appeared for the Plaintiff, and Thomas Walker appeared for the Defendant. The Court ruled from the bench denying Meridian's Motion to Strike certain affidavits submitted by Petra on September 13, 2010, and denying Petra's Motion to Strike Ted Baird's April 1, 2010, affidavit. At the conclusion of the hearing, the Court considered the Motion for Leave to Amend to add punitive damages, the Motion for Summary Judgment, and the



1 remaining Motions to Strike fully under advisement. This Order denies Plaintiff Meridian's Motion  
2 for Leave to Amend to add punitive damages.

3 **MOTION FOR LEAVE TO AMEND TO ADD PUNITIVE DAMAGES STANDARD**

4 The Idaho Rules of Civil Procedure authorize the Court to allow a party to amend their  
5 pleadings when required in the interest of justice. I.R.C.P. 15(a). Idaho Courts have held "that 'great  
6 liberality should be exercised in permitting amendments to pleadings in furtherance of justice  
7 between the parties' and that this matter is entrusted to the sound discretion of the trial court."  
8 *Chadderdon v. King*, 104 Idaho 406, 408-09, 659 P.2d 160, 162-63 (Ct. App. 1983). However,  
9 leave to amend in order to add a claim for punitive damages is guided by a different standard.  
10

11 Under Idaho law, punitive damages are available for a party's oppressive, fraudulent,  
12 malicious, or outrageous conduct. I.C. § 6-1604(1) (2010). Courts shall allow a party to amend its  
13 pleadings in order to seek punitive damages if the Court concludes, after weighing the evidence,  
14 that the moving party has established a reasonable likelihood of proving, by clear and convincing  
15 evidence, facts at trial sufficient to support an award of punitive damages. I.C. § 6-1604(1)(2).  
16 Under this statute, the court acts as a gatekeeper. It must weigh the evidence and grant the motion  
17 only if it concludes that the moving party has met its burden. Idaho Code § 6-1604(2). The  
18 determination of whether a plaintiff has established a reasonable likelihood of proving a claim for  
19 punitive damages is within the sound discretion of the trial court. *Vendelin v. Costco Wholesale*  
20 *Corp.*, 140 Idaho 416, 423, 95 P.3d 34, 41 (2004). In making this determination, the Court must  
21 consider only the record as a whole. *See generally Arnold v. Diet Center, Inc.*, 113 Idaho 581, 583,  
22 746 P.2d 1040, 1042 (Ct. App. 1987).  
23  
24  
25  
26

1 “Punitive damages are not favored in the law and should be awarded in only the most unusual  
2 and compelling circumstances.” *Manning v. Twin Falls Clinic & Hosp.*, 122 Idaho 47, 52, 830 P.2d  
3 1185, 1190 (1992); *Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 905, 665 P.2d 661, 669  
4 (1983); *Gunter v. Murphy’s Lounge, LLC*, 141 Idaho 16, 29, 105 P.3d 676, 689 (2005). Although  
5 punitive damages are generally not available for an ordinary breach of contract claim, they are  
6 available if the moving party can show the intersection of a bad act (i.e. the breach) and a bad state of  
7 mind. *General Auto Parts Co. v. Genuine Parts Co.*, 132 Idaho 849, 853, 979 P.2d 1207, 1211  
8 (1999); *Meyers v. Workmen’s Auto Ins. Co.*, 140 Idaho 495, 502-03, 95 P.3d 977, 984-85 (2004).  
9 Therefore, in this instance, Meridian must provide the court with evidence that the defendant acted  
10 wrongfully and with a culpable state of mind. *Myers*, 140 Idaho at 503, 95 P.3d at 985. Specifically,  
11 the evidence must demonstrate that the Petra’s conduct was an extreme deviation from the standards  
12 of reasonable conduct, and its conduct was performed with an appreciation of its likely effects. *Id.*

13  
14  
15 **MERIDIAN’S MOTION FOR LEAVE TO AMEND TO ADD PUNITIVE DAMAGES**

16 Meridian asserts that Petra willfully breached the Construction Management Agreement  
17 (CMA) that dictated the parties’ contractual responsibilities. Specifically, Meridian asserts that the  
18 words “trust and confidence” as used in the CMA elevated Petra to a fiduciary status; that Petra made  
19 multiple, specific affirmative representations to Meridian as to its expected fee under the CMA and  
20 that Petra knew the representations were false when it made them; that Petra made these  
21 representations both in open, public meetings and in private meetings between the parties; and that  
22 Petra expected Meridian to rely on these false representations. Meridian directs the Court to CMA  
23 wording and extensive affidavit testimony in support of the above recited claims, and Meridian  
24  
25

1 asserts that this combination of facts combined with Petra's duty to act in "trust and confidence"  
2 warrants a claim for punitive damages in this case.

3 The term fiduciary is a broad one and courts have consistently refrained from defining it in  
4 such a way so as to exclude future applications of the term. 37 AM. JUR. 2D *Fraud and Deceit* § 32  
5 (2010). Fiduciary implies that one party is in a dominant position to the other and that the servient  
6 party reposes trust in the dominant party. *Idaho First Nat'l Bank v. Bliss Valley Foods*, 121 Idaho  
7 266, 278, 824 P.2d 841, 853 (1991). In order to find a fiduciary duty, "facts and circumstances must  
8 indicate that the one reposing the trust has foundation for his belief that the one giving advice or  
9 presenting arguments is acting not in his own behalf, but in the interests of the other party." *Id.* The  
10 Idaho Supreme Court has used the words "trust and confidence" to indicate the existence of a  
11 fiduciary duty. *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (1997); *High Valley Concrete v.*  
12 *Sargent*, 149 Idaho 423, 428, 234 P.3d 747, 752 (2010).

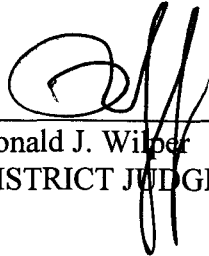
14 The CMA § 1.1 states: "Construction Manager acknowledges and accepts the relationship of  
15 trust and confidence established by this Agreement and that this relationship is a material  
16 consideration for Owner in entering into this Agreement." In Meridian's moving documents and  
17 during the September 16, 2010, hearing, Mr. Trout argued that Meridian's understanding of the  
18 CMA terminology is that Petra did have the duty to act as a fiduciary on behalf of Meridian. Mr.  
19 Walker replied that had Petra understood this language to create a fiduciary duty it would not have  
20 agreed to the CMA. Based on the Idaho Supreme Court's application of the words "trust and  
21 confidence," and based on the trust Meridian placed in Petra to manage their City Hall project, it is  
22 likely that Petra stands in the position as a fiduciary to Meridian. However, even if Petra does stand  
23

1 as a fiduciary to Meridian, the Court is not persuaded that Meridian has presented sufficient  
2 evidence to warrant addition of a claim of punitive damages.

3 An addition of a claim for punitive damages may be appropriate when, after weighing the  
4 evidence presented, the Court determines a party has a reasonable likelihood of proving oppressive,  
5 fraudulent, malicious, or outrageous conduct by clear and convincing evidence. I.C. § 6-1604(1)(2).  
6 Additionally, because this is a contract case, Idaho caselaw requires the Court to evaluate the  
7 evidence for a bad act coupled with bad intent and that it represents an extreme deviation from the  
8 standards of reasonable conduct in like situations. *Meyers v. Workmen's Auto.*, 140 Idaho 495  
9 (2004). In this instance, the Court has exhaustively reviewed the affidavit testimony and supporting  
10 exhibits. While the Court finds that there are disagreements and misunderstandings between the  
11 parties as to many of their respective responsibilities under the CMA, and that such disagreements  
12 and misunderstandings have led to the current claims for breach of contract, the Court is not  
13 persuaded that the evidence found in the record is sufficient to provide Meridian a reasonable  
14 likelihood of proving the fraudulent and outrageous behavior that evidences a bad act and bad intent  
15 required by the caselaw and the statute. Therefore, Meridian's Motion for leave to file a First  
16 Amended Complaint to add a claim for punitive damages is DENIED.  
17  
18

19 IT IS SO ORDERED.

20  
21 Dated this 24<sup>th</sup> day of September, 2010.

22  
23  
24   
25 \_\_\_\_\_  
26 Ronald J. Wilber  
DISTRICT JUDGE

CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 27 day of September, 2010, I caused a true and correct copy of the foregoing ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT TO ADD A CLAIM FOR PUNITIVE DAMAGES to be served by the method indicated below, and addressed to the following:

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J. DAVID NAVARRO  
Clerk of the District Court  
Ada County, Idaho

By INGA JOHNSON  
Deputy Clerk

SEP 27 2010

J. DAVID NAVARRO, Clerk  
By INGA JOHNSON  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN,  
an Idaho Municipal Corporation,

Plaintiff,

vs.

PETRA INCORPORATED,  
an Idaho Corporation,

Defendant.

Case No. CVOC 09 07257

ORDER GRANTING IN  
PART AND DENYING  
IN PART PLAINTIFF'S AND  
DEFENDANT'S MOTIONS  
TO STRIKE

This matter came before the Court on both parties' multiple Motions to Strike made in connection with Plaintiff Meridian's Motion for Leave to Amend to Add Punitive Damages and Defendant Petra's Motion for Summary Judgment. In this Order the Court first addresses Meridian's Motions to Strike all or portions of certain affidavits submitted in support of Defendant Petra's Motion for Summary Judgment. Next, the Court addresses Petra's Motions to Strike all or portions of certain Affidavits submitted either in support of Plaintiff Meridian's Motion for Leave to Amend or in opposition to Petra's Motion for Summary Judgment. The Court heard oral argument on these motions on Thursday, September 16, 2010. Kim Trout and Daniel Glynn appeared for Plaintiff Meridian. Thomas Walker appeared for Defendant Petra.

1 The Court issued its ruling from the bench denying two Motions to Strike. Holding that as to  
2 the affidavits of Richard Bauer, Eugene Bennett, Tom Coughlin, and Jerry Frank filed by Petra on  
3 September 13, 2010, they were timely filed according to an altered schedule previously instructed  
4 by the Court, and as to an April 1, 2010, affidavit of Theodore Baird filed one day late by Meridian  
5 that it was excusable neglect causing no prejudice and was not untimely filed with any attempt to  
6 gain an unfair advantage.

7 The Court considered the remaining Motions to Strike fully under advisement.

### 8 ADMISSIBILITY OF AFFIDAVITS

9  
10 Admissibility of evidence is a matter within the Court's discretion. *Burgess v. Salmon River*  
11 *Canal Co., Ltd.*, 127 Idaho 565, 574, 903 P.2d 730, 739 (1995). "The admissibility of evidence in  
12 affidavits and depositions in support of or in opposition to a motion for summary judgment is a  
13 threshold question to be answered before applying the liberal construction and reasonable inferences  
14 rule to determine whether the evidence is sufficient to create a genuine issue for trial." *J-U-B-*  
15 *Engineers v. Security Ins. Co. of Hartford*, 146 Idaho 311, 314-5, 193 P.3d 858, 861-2 (2008).  
16 Affidavits submitted to support or oppose summary judgment "shall be made on personal  
17 knowledge, shall set forth such facts as would be admissible in evidence, and shall show  
18 affirmatively that the affiant is competent to testify to the matters stated therein." I.R.C.P. 56(e).

19  
20 In consideration of summary judgment, or otherwise, affidavits of expert witnesses are  
21 allowed under Idaho Rule of Evidence 702 if "scientific, technical, or other specialized knowledge  
22 will assist the trier-of-fact to understand the evidence or to determine a fact in issue." *Id.* When  
23 determining the admissibility of an expert's opinion, the focus of the trial court's inquiry is on the  
24 principles and methodology used and not the conclusions they generate. *Weeks v. E. Idaho Health*  
25

1 Services, 143 Idaho 834, 838, 153 P.3d 1180, 1184 (2007). Affidavits containing the opinions of lay  
2 witnesses may also be considered by the trier-of-fact; however, when the determination of an issue  
3 requires expert knowledge, a lay opinion is not sufficient to raise a genuine issue of material fact  
4 preventing summary judgment. *Puckett v. Oakfabco Inc.*, 132 Idaho 816, 823, 979 P.2d 1174, 1181  
5 (1999).

### 6 MERIDIAN'S MOTIONS TO STRIKE

7 Meridian seeks to strike the affidavits of Jack Lemley, Eugene Bennett, Tom Coughlin, and  
8 Jerry Frank either in their entirety or portions thereof. For the purposes of these motions, Petra  
9 submits Mr. Lemley as an expert witness, Mr. Bennett, Mr. Coughlin, and Mr. Frank are submitted  
10 as lay witnesses.  
11

12 The Court finds that the April 30, 2010, Lemley affidavit is admissible expert witness  
13 evidence. "The facts or data in the particular case upon which an expert bases his opinion or  
14 inference may be those perceived by or made known to the expert at or before the hearing." I.R.E.  
15 703. In this case, a proper foundation is laid for use of Lemley as an expert witness. *See* Exh. A  
16 *Affidavit of Jack Lemley*. In making his conclusions, Lemley relied upon "interviews conducted by  
17 [he] and Mr. Bauer and upon our review of the pertinent documents, which [Lemley and Bauer]  
18 have discussed in detail." *Affidavit* at 2. His opinions are also based on his "knowledge of the  
19 prevailing standards of care applicable to construction managers as well as [his] own experience and  
20 expertise in the area." *Id.* The Court finds these are appropriate methods for creation of opinions for  
21 a person with Lemley's expertise, therefore, Meridian's Motion to Strike the affidavit of Lemley is  
22 DENIED.  
23  
24  
25



1 The Court finds the affidavits of Bennett, Coughlin, and Frank are admissible lay witness  
2 opinions. Therefore, their testimony is limited to “those opinions or inferences which are (a)  
3 rationally based on the perception of the witness, and (b) helpful to a clear understanding of the  
4 testimony of the witness or the determination of a fact in issue, and (c) not based on scientific,  
5 technical or other specialized knowledge within the scope [given to expert witnesses].” I.R.E. 701.  
6 When the determination of an issue requires expert knowledge, a lay opinion is not sufficient to  
7 raise a genuine issue of material fact preventing summary judgment. *Puckett v. Oakfabco Inc.*, 132  
8 Idaho at 823.

9  
10 The Court finds portions of Bennett’s May 5, 2010, affidavit exceed the scope allowed a lay  
11 witness and, therefore, Meridian’s Motion to Strike is GRANTED as to the following paragraphs of  
12 that affidavit as they might relate to the Court’s evaluation of Petra’s Motion for Summary  
13 Judgment: 10, 14, 19, 27, 134, 148, and 151. For the same reason, Meridian’s Motion to Strike is  
14 GRANTED as to the following paragraphs of Bennett’s April 7, 2010 affidavit submitted in  
15 opposition to Meridian’s Motion for leave to amend to add punitive damages: 104, 107, 109, 110,  
16 116, 121, 127, and 128.

17  
18 The Court finds that paragraph 7 of Coughlin’s May 5, 2010, affidavit exceeds the scope  
19 allowed a lay witness and, therefore, Meridian’s Motion to Strike paragraph 7 is GRANTED as it  
20 might relate to the Court’s evaluation of Petra’s Motion for Summary Judgment.

21 The Court finds that paragraph 8 of Frank’s May 4, 2010, affidavit exceeds the scope  
22 allowed a lay witness and, therefore, Meridian’s Motion to Strike paragraph 8 is GRANTED as it  
23 might relate to the Court’s evaluation of Petra’s Motion for Summary Judgment. For the same  
24

1 reason, Meridian's Motion to Strike is GRANTED as to paragraph 12 of Frank's April 7, 2010  
2 affidavit submitted in opposition to Meridian's Motion for leave to amend to add punitive damages.

3 **PETRA'S MOTIONS TO STRIKE**

4 Petra seeks to strike portions of eleven (11) affidavits as they relate to support of Meridian's  
5 opposition to Petra's Motion for Summary Judgment. Additionally, Petra seeks to strike portions of  
6 three (3) of those affidavits as they relate to support of Meridian's Motion for Leave to Amend to  
7 add punitive damages. The Court addresses each of these motions below.

8 The Court finds the July 2, 2010, affidavit of Steven Amento, a construction manager  
9 retained as an expert by Meridian, is admissible expert witness testimony. However, Petra's Motion  
10 to Strike is GRANTED as to paragraphs 7, 24, and 44 on the grounds that they state impermissible  
11 legal conclusions and lack foundation.

12 The Court finds the July 6, 2010, affidavit of Ted Baird, Meridian Asst. City Attorney, is  
13 admissible lay witness testimony. However, Petra's Motion to Strike is GRANTED as to the  
14 following paragraphs of that affidavit on the grounds of lack of personal knowledge or that they are  
15 impermissibly conclusory: 2(e), 19, 21, 29, 30, and 33.

16 The Court finds the July 6, 2010, affidavit of Laura Knothe, an engineer retained by  
17 Meridian to assist with construction and warranty issues, is admissible expert witness testimony.  
18 However, Petra's Motion to Strike paragraph 4 of the affidavit is GRANTED as Knothe's reference  
19 to abandonment is impermissibly conclusory and made without personal knowledge.

20 The Court finds the July 6, 2010, affidavit of Franklin Lee, an attorney hired by Meridian to  
21 help create the Construction Management Agreement, as admissible lay witness testimony.

1 However, Petra's Motion to Strike paragraphs 2, and 4-13 is GRANTED on the grounds that they  
2 state impermissible legal conclusions.

3 The Court finds the affidavits of Keith Watts, Meridian's Purchasing Agent, are admissible  
4 lay witness opinions. However, Petra's Motion to Strike is GRANTED as to the following  
5 paragraphs of Watts' May 24, 2010, affidavit as impermissibly speculative, asserting legal  
6 conclusions, or falling outside the scope of his personal knowledge: 13, 21, 22, 25, 33, and 38. For  
7 the same reasons, Petra's Motion to Strike is GRANTED as to the following paragraphs of Watts'  
8 September 28, 2009, affidavit: 6, 7, and 8.

9  
10 The Court finds the affidavits of Todd Weltner, a general contractor retained as an expert by  
11 Meridian, are admissible expert witness testimony. However, Petra's Motion to Strike is  
12 GRANTED as to paragraph 42 of Weltner's May 24, 2010, affidavit as impermissibly conclusory.  
13 For the same reason, Petra's Motion to Strike is GRANTED as to paragraph 15 of Weltner's July 6,  
14 2010, affidavit.

15 Petra seeks to strike portions of the following three (3) affidavits as they relate to both  
16 Meridian's opposition to Petra's Motion for Summary Judgment and Meridian's Motion for Leave  
17 to Amend to add punitive damages.

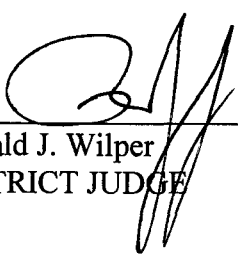
18  
19 The Court finds Ted Baird's April 1, 2010, affidavit is admissible due to Baird's capacity as  
20 Meridian Asst. City Attorney. The Court similarly finds Ted Baird's August 30, 2010, affidavit is  
21 admissible. Therefore, Petra's Motions to Strike portions of both of these Baird affidavits is  
22 DENIED.

23 Finally, the Court finds the August 30, 2010, affidavit of David Zaremba, a Meridian City  
24 Councilman, is admissible lay witness testimony. Zaremba's role as councilman provides him the  
25

1 foundation and personal knowledge to speak on behalf of City in regards to its actions at the April  
2 3, 2007, meeting between Meridian and Petra. Therefore, Petra's Motion to Strike Zaremba's  
3 affidavit is DENIED.

4  
5 IT IS SO ORDERED.

6  
7 Dated this 24<sup>th</sup> day of September, 2010.

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10   
11 Ronald J. Wilper  
12 DISTRICT JUDGE  
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CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 27 day of September, 2010, I caused a true and correct copy of the foregoing ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO STRIKE to be served by the method indicated below, and addressed to the following:

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By WGA JOHNSON  
Deputy Clerk

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DEPUTY

Attorneys for Plaintiff The City of Meridian

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**REPLY MEMORANDUM IN SUPPORT  
OF PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

The City of Meridian (hereinafter referred to as the "City") submits this Memorandum in Support of its Motion for Summary against the Defendant Petra, Incorporated (hereinafter referred to as "Petra") with respect to all claims asserted by way of its Counterclaim against the City.

**A. PETRA'S CLAIM IS BARRED BY THE EXPRESS NOTICE OF CLAIM PROVISIONS OF THE CMA.**

In response to the City's Motion for Summary Judgment based on Petra's failure to provide written notice to the City as required by the express provisions of Section 8 of the Construction Management Agreement (hereinafter referred to as "CMA"), it must be noted that Petra admits that it did not provide any written notice to the City until, at the earliest, after February 24, 2009. In so doing, the record stands unrefuted that commencing in January of 2007, Petra began submitting to the City cost estimates which reflected increased "Total Project Costs," but did not reflect any

EU

increased cost to Petra's construction management fee of \$574,000. In all subsequent reiterations of the cost estimate from Petra presented to the City from January 2007 through July 2007, Petra admits that project costs increased but its representation as to the construction management fee remained constant. It is against this now unrefuted evidence in the record that the appropriateness of the City's request for summary judgment becomes evident.

Acknowledging that Section 8 of the CMA requires the submission of written notice with respect to any claim, Petra asserts that this Court can ignore these indisputable facts because a "claim" does not exist until the City denies Petra's request for additional compensation. Thus, under Petra's argument, it could toll any claim it possessed against the City simply by never presenting the claim to the City to consider in the first place. Under Petra's interpretation of the language of Section 8, and exactly as Petra did in this matter, Petra believes it is entitled to represent that its construction management fee will not change despite increases in the costs of construction, obtain the City's assent to complete the work called for under the CMA, and then afterward insist that the City pay it additional compensation for the work performed.

Petra is correct that "the interpretation of a contract begins with the language of the contract itself." *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007). However, what Petra overlooks is that it is also axiomatic that "[i]n construing a contract, an interpretation should be avoided that would render meaningless any particular provision in the contract." *Star Phoenix Mining Company v. Hecla Mining Company*, 130 Idaho 223, 233, P.2d 542, 552 (1997). According to Petra, a claim does not exist until Petra says it does (*i.e.* submits a claim), an interpretation which not only is absurd and renders the notice provision meaningless, but is also contrary to the express purposes of a notice provision such as this one.

While Petra's arguments are focused on contract interpretation, one should not overlook that Petra was under a duty to not only comply with the notice provisions of the CMA, but also the

Idaho Tort Claims Act, I.C. § 50-201 *et seq.* While the issues pertaining to notice under the ITCA are presented in the City's Motion to Dismiss pursuant to the Idaho Tort Claims Act, it is worth noting that one of the express purposes of the notice requirement under the ITCA, which the City asserts is likewise applicable to the analysis of Section 8 of the CMA, is "to save needless expense and litigation by providing an opportunity for amicable resolution of the differences between parties..." *Pounds v. Denison*, 120 Idaho 425, 426-27, 816 P.2d 982, 983-84 (1991).

Petra failed to present a proper and timely notice to the City at a time when it knew, or should have reasonably discovered, it believed it had a claim against the City for an increase in the construction management fee given the increased estimated costs of construction that it was actively generating. One can only imagine how much expense might have been saved, how much litigation would have actually been required, had Petra simply submitted written notice as early as January, or as late as July 2007, that it intended to seek an increase in its construction management fee based on the increased construction costs that it was calculating. Unfortunately, supposition is all that can be had on the matter, because Petra failed to submit any written notice until after it had performed based on its prior representations as to the amount of the construction management fee. Petra cannot twist the express language of Section 8 into absurdity in order to provide it with a remedy in these proceedings that it failed to preserve appropriately.

Because the terms of the CMA are express and unambiguous, and because the interpretation provided by Petra renders the language of the CMA concerning the presentment of claims meaningless, Petra's attempt to bolster its interpretation with purported evidence of industry usage and course of dealing must be rejected. Only when a contract term is ambiguous may extrinsic evidence be considered. *See International Engineering Co., Inc. v. Daum Industries, Inc.*, 102 Idaho 363, 365, 630 P.2d 155, 157 (1981). Evidence of the parties conduct or course of dealing is admissible only for the purposes of determining the intent of parties with respect to an ambiguous term. *J.R.*



*Simplot Co. v. Bosen*, 144 Idaho 611, 614, 167 P.3d 748, 751 (2006). Petra's opposition memorandum is replete with its admission that Section 8 is "clear," "plain," and "unambiguous." After recognizing the unambiguous nature of these terms, Petra cannot now seek to introduce extrinsic evidence of course of dealing, course of performance, or industry usage to bolster its clearly strained interpretation of those terms.

The provisions of the CMA clearly and unambiguously required written notice upon the occurrence of the event or the first appearance of the circumstances giving rise to a claim, and Petra wholly failed to timely comply with this requirement. Its failure to do so bars the assertion of its claims in this matter. See *Absber Construction Co. v. Kent School District No. 415*, 890 P.2d 1071 (Wa. Ct. App. 1995) (where contract provided a procedure for claims for extra work, which provisions are mandatory, contractor failure to follow these procedures results in waiver of contractors claim); *Johnson v. County of Spokane*, 78 P.3d 161, 169 (2003) (holding that "actual notice is not an exception to contract compliance" concerning notification procedures).

**B. PETRA'S CLAIM FOR ESTOPPEL AGAINST THE CITY MUST BE REJECTED.**

In a great ironic twist, after having submitted multiple cost estimates reflecting that, despite increasing costs of construction, Petra would not seek an increase in its construction management fee and then seeking an increased fee after obtaining the City's assent to project costs, Petra now asserts that it is the City which should be estopped. As such, Petra's claim for estoppel should be rejected out of hand as it is Petra, not the City, which has taken an inconsistent position with regard to the express terms of the CMA. What the City "knew" was that Petra would not be seeking an increased construction management fee, despite the increased project costs. What Petra knew was apparently to the contrary, *i.e.* that it would be seeking an increased fee. Estoppel, either equitable or quasi-estoppel, is simply unavailable on these facts

However, the Court need not even reach the issue of estoppel as it is clear that equitable estoppel may not be invoked against a government or public agency. *Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 137-38, 997 P.2d 591, 598-99 (2000); *Harrell v. City of Lewiston*, 95 Idaho 243, 248-49, 506 P.2d 470, 475-76 (1973); *Sprenger, Grubb & Associates v. City of Hailey*, 127 Idaho 576, 583-84, 903 P.2d 741, 748-49 (1995); *Big Lost River Irr. Dist.*, 93 Idaho 227, 229-230, 459 P.2d 1009, 1011, 1012 (1969).

Petra's claim for estoppel is without merit, and cannot be asserted against the City.

**C. PETRA'S CLAIM UNDER SECTION 6.2.2 IS BARRED FOR FAILING TO COMPLY WITH THE CMA.**

The City is also entitled to summary judgment as against Petra's claims based on its failure to comply with the clear, unambiguous provisions of the CMA requiring that for any request to adjust the construction management fee based on "material changes" that Petra's request include "the actual number of hours worked in furtherance of the change." CMA § 6.2.2. Petra seeks to evade the application of this provision based on its assertion, from its expert, that Petra could not separate the original work from the work in furtherance of the change and that such a requirement was not reasonable.

Unfortunately for Petra, Gene Bennett, Petra's Senior Advisor, admitted in his deposition testimony directly contrary to the assertion of Petra's "expert" Richard Bauer. Mr. Bennett testified as follows in the course of his deposition:

Q. And as of February 12th, 2007, you, as the construction manager, were clearly aware that there were going to be changes in costs for the masonry, correct?

A. We were aware of that, yes.

Q. All right. And I would be correct in understanding that had you chosen to track the time of all Petra employees as it related to those changes, you could have issued an order as of February 12th, 2007, for all Petra employees to track their time in furtherance of those changes, couldn't you?

A. Why would we?

Q. I wasn't asking you why, sir. I asked you whether you could have done that had you chosen to do so?

A. I guess I don't understand the necessity of it.

Q. That wasn't my question either. My question was a very simple question. Had you chosen to do so, you could have tracked all of the time of every Petra employee in furtherance of the change related to mechanical, electrical and plumbing, couldn't you?

A. We could have, but I didn't see a necessity for it.

Q. All right. And that would be true, i.e., Petra could have tracked all of its time related to any given change had it chosen to do so; isn't that a fact?

A. If we had saw the necessity for it, we could have.

Aff. Kim J. Trout ¶ 6b, Ex. D-2 622:23-623:6 (Sept. 1, 2010).

Thus, Petra cannot seek to create a genuine issue of material fact by way of expert testimony which is directly contrary to the testimony of Petra's own representative provided under oath during the course of his deposition. Mr. Bauer's affidavit in this regard is just as much of a "sham affidavit" as if it had been provided by Mr. Bennett himself. *See Matter of Estate of Keeven*, 126 Idaho 290, 298, 882 P.2d 457, 465 (Ct. App. 1994) (sham affidavit which contradicts prior testimony should not be considered on summary judgment). *See also, Tolmie Farms, Inc. v. J.R. Simplot Co.*, 124 Idaho 607, 610, 862 P.2d 299, 302 (1993). Moreover, as noted above, the testimony of Mr. Bauer as to what was "reasonably expected" under the contract should be disregarded in view of the fact that the terms upon which Mr. Bauer purports to opine are clear, plain and unambiguous.

Section 6.2.2 required that Petra track the actual hours worked in furtherance of any change upon which it would base an increase in its construction management fee and Petra admitted that it could have, but chose not to track such hours. Under the indisputable evidence, Petra's arguments must be rejected and the City's Motion for Summary Judgment on the basis of Section 6.2.2 of the CMA must be granted.

### CONCLUSION

Whether considered under the express terms of the CMA, or the provisions of the ITCA, the undisputed evidence in the record reveals that Petra failed to provide the required notice, and substantiate its purported claim against the City. Summary Judgment in favor of the City is

appropriate and the Court should grant the City's Motion for Partial Summary Judgment regarding Petra's Counterclaims.

DATED this 27<sup>TH</sup> day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
GOURLEY, P.A.

By: 


Kim J. Trout  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 27<sup>TH</sup> day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

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**KIM J. TROUT, ISB #2468****TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.**

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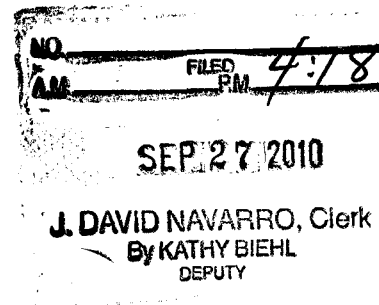
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Attorneys for Plaintiff The City of Meridian



**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**REPLY MEMORANDUM IN SUPPORT  
OF PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT RE:  
LIABILITY**

The City of Meridian (hereinafter referred to as the "City") submits this Reply Memorandum in Support of its Motion for Partial Summary Judgment against the Defendant Petra, Incorporated (hereinafter referred to as "Petra") seeking an order finding Petra in material breach of the Construction Management Agreement (hereinafter referred to as the "CMA").

**A. Petra Owed, and Breached, its Fiduciary Duty to the City in Discharging its Duties as a Construction Manager.**

The City has moved for summary judgment with respect to a finding that Petra has materially breached the terms of the CMA based upon the multiple failures of Petra to fulfill its contractually imposed duties. Perhaps the most significant of these duties, and the duty by which all other obligations that Petra owed the City must be viewed, is the fiduciary duty that Petra owed to the City in the performance of its duties as construction manager under the CMA.

Once again, the language of the CMA is clear and unambiguous:

**REPLY CITY OF MERIDIAN MOTION FOR PARTIAL SUMMARY JUDGMENT RE: LIABILITY**

Page 1

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Construction Manager acknowledges and accepts the relationship of trust and confidence established with Owner by this Agreement and that this relationship is a material consideration for Owner in entering into this agreement. Accordingly, Construction Manager shall, at all times, act in a manner consistent with this relationship. Construction Manager further covenants that Construction Manager will perform its services under this Agreement, in the exercise of ordinary and reasonable care and with the same degree of professional skill, diligence and judgment as is customary among construction managers of similar reputation performing work for projects of a size, scope and complexity similar to the Project. Construction Manager shall, at all times, further the interest of Owner through efficient business administration and management.

Pl.'s Compl. Ex. A (April 16, 2009) (emphasis added).

Incredibly, despite the presence of clear and express language imposing upon Petra its acceptance of "the relationship of trust and confidence," that Petra's acceptance was "a material consideration" for the City, and that Petra was to "further the interest" of the City, Petra responds that it never intended to enter into a fiduciary relationship. However, extrinsic evidence of the parties' intention is inadmissible where the terms are express, clear and unambiguous. Only when a contract term is ambiguous may extrinsic evidence be considered. *See International Engineering Co., Inc. v. Daum Industries, Inc.*, 102 Idaho 363, 365, 630 P.2d 155, 157 (1981). Evidence of the parties conduct or course of dealing is admissible only for the purposes of determining the intent of the parties with respect to an ambiguous term. *J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 614, 167 P.3d 748, 751 (2006).

Nothing could be clearer than the express recognition that the City relied upon Petra's acceptance of a relationship of "trust and confidence." As the Idaho Supreme Court recently recognized, "[t]he term fiduciary implies that one party is in a superior position to the other and that such a position enables him to exercise influence over one who reposes special trust and confidence in him." *High Valley Concrete, LLC v. Sargent*, 149 Idaho 423, 234 P.3d 747 (2010), *quoting*, *Idaho First National Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 278, 824 P.2d 841, 853 (1991). *See also Gray v. Tri-Way Const. Services, Inc.*, 147 Idaho 378, 386, 210 P.3d 63, 71 (2009) (recognizing that an action in

constructive fraud exists when there has been a breach of a duty arising from a relationship of trust and confidence, as in a fiduciary duty."); *See also Mitchell v. Barendregt*, 120 Idaho 837, 844, 820 P.2d 707, 714 (Ct. App. 1991) (holding that mere contractual relationship and duty of good faith is not sufficient "to establish a relationship of trust and confidence from which the law will impose fiduciary obligations." (emphasis added))

Thus, it is without question that the express acceptance of a duty of "trust and confidence" can be construed as nothing other than the acceptance of a fiduciary relationship between the parties. Petra owed a fiduciary relationship, the City materially relied upon Petra's acceptance of this relationship between the parties, and Petra cannot now seek to evade its duties to perform in accordance with this fiduciary relationship through the use of extrinsic self-serving evidence that the imposition of this duty meant nothing more than an arms-length relationship.

**B. Petra Breached its Fiduciary Duty to Provide the City With Written Reports as Required by Section 4.2 of the CMA**

Seeking to evade its fiduciary responsibility to the City, and justifying its failure to comply with the express provisions with regard to the CMA, Petra repeatedly asserts as to each of the grounds upon which the City seeks summary judgment that: (1) the City failed to undertake an act; or (2) the City waived Petra's requirement to act. Unfortunately for Petra, neither of these attempts to evade the responsibility for its failure to comply with the express contract terms, to the City's detriment and damage, has merit.

With respect to the requirement of Section 4.2, which requires that Petra submits to the City a written report detailing its understanding of the City's desires, Petra admits it did not provide such a report but argues that because the City did not deliver to Petra an "Owner's Criteria," Petra was no longer required to submit a written report. However, Petra's argument is belied by the fact that Petra was under an express duty, fiduciary in nature, to "do all things, or, when appropriate require Architect and each Contractor to do all things necessary, appropriate or convenient to achieve the

end result desired by Owner.” CMA § 4.1. Thus, it is not enough for Petra to simply say the City did not provide it with the Owner’s Criteria without explaining why it failed to ensure that it received such from the City. As noted in the City’s moving papers, Petra’s written report was a crucial document which would have identified “any design, construction, scheduling, budgetary, and operational or other problems or recommendations.” CMA § 4.2. It is not mere speculation, it is recognizable fact given the protracted nature of this litigation and the numerous defects that arose during the construction of the project, that the lack of this written report had a profound, detrimental impact upon the City. An injury, to which Petra added insult, by nonetheless charging for the completion of the written report it never submitted. *Aff. Kim J. Trout ¶ 7* (Sept. 1, 2010).

Moreover, Petra cannot simply acknowledge its own failure, blame the City for Petra’s failure to act consistently with the fiduciary obligations it accepted and then declare “waiver.” “Waiver is a voluntary, intentional relinquishment of a known right or advantage.” *Brand S. Corp. v. King*, 102 Idaho 731, 733-34, 639 P.2d 429, 431-32 (1981). Most importantly however, “waiver will not be inferred except from a clear and unequivocal act manifesting an intent to waive.” *Medical Services Group, Inc. v. Boise Lodge No. 310*, 126 Idaho 90, 878 P.2d 789 (Ct.App. 1994).

Additionally, Petra’s waiver arguments ignore the fact that Section 10.17 of the CMA expressly provides that “[a]ny waivers hereunder must be in writing. No waiver of right or remedy in the event of default hereunder shall constitute a waiver of such right or remedy in the event of a subsequent default.” CMA § 10.17. *See Absber Construction Co. v. Kent School District No. 415*, 890 P.2d 1071 (Wa. Ct. App. 1995) (county would not be found to have waived contractual requirements where, among other evidence, construction agreement required that waiver be in writing). *See also, Johnson v. County of Spokane*, 78 P.3d 161, 169 (2003) (mere fact that a political subdivision continues to engage a public works contractor despite the presence of substantial disagreement between the owner and contractor does not equate with a finding of waiver.)



Petra concedes that it did not provide the written report required by Section 4.2 and as the evidence present in these proceedings convincingly demonstrates, such failure, has caused substantial damage to the City. Summary Judgment as to Petra's breach of Section 4.2 of the CMA is appropriate.

**C. Petra Breached its Fiduciary Duty to Provide the City With Written Reports as Required by Section 4.6 & 4.7 of the CMA**

As was the case with justifying its failure to act consistent with its fiduciary relationship with the City pursuant to Section 4.2 of the CMA, Petra once again blames the City for its own failures, asserts that the City waived Petra's obligations, and that its failure did not constitute a breach of the CMA. As was the case with regard to Section 4.2, Petra's arguments are without merit and summary judgment in favor of the City is appropriate.

First, the City has established in the record that Petra, as one example, failed to administer the contract with Rule Steel consistent with its contractual, and fiduciary, duties. The fact that Petra wishes to ignore the evidence placed in the record, or chose not to refute it, does not mean that the City has failed to establish such breaches. These examples are summarized at pages 7-8 of Petra's original memorandum in support of the instant motion and will not be restated here. However, it is sufficient for these purposes to point out that while Petra offers the self-serving statements of Mr. Coughlin that Rule Steel requested additional time, it has presented no evidence from Rule Steel itself or that the City was made aware of these requests for additional time. As noted by the City, the only notation to this affect is a post-approval modification to a change order. The City has asserted that there is no evidence to support the allegation of Petra, Petra has responded solely with the self-serving statements of its principals. Such argument does not create a genuine issue of material fact sufficient to avoid the entry of summary judgment.

Second, as noted above there is no clear and unequivocal evidence in the record establishing that the City waived Petra's fiduciary duty with regard to the administration of the prime contracts.

Contrary to the assertions of Petra, the Idaho Supreme Court case of *Obray v. Mitchell*, 98 Idaho 533, 567 P.2d 1284 (1977) does not address an analogous situation which should be applied in these proceedings. In *Obray*, the Court affirmed the application of waiver to prevent an owners assertion that it was not liable for contract "extras" performed without owner executed purchase orders where the evidence established that for the duration of the contract the owner had consistently paid for contract "extras" without such purchase orders. Petra can show no likewise waiver of conduct by the City in its administration of the prime contracts. To the contrary, given the unilateral modification to Rule Steel related purchase orders, it is apparent that if anything is established by Petra's course of conduct, it is a pattern of silence, unilateral modification, and exclusion of the City's knowledge of the true state of affairs.

The evidence in the record establishes, at least as far as Rule Steel, that absent the breach of Petra's fiduciary duties under the CMA generally, and Section 4.6 & 4.7 specifically, the City would be entitled to liquidated damages from Rule Steel. Thus, the record establishes not only a further breach of the CMA, but the materiality of the breach and the damages flowing therefrom. Summary Judgment as to Section 4.6 & 4.7 of the CMA is appropriate.

**D. Petra Materially Breached its Fiduciary Duty to the City Under the CMA by Failing to Protect the City from Defective or Deficient Work.**

Petra does not challenge the evidence presented in the Affidavit and deposition testimony of Steven Amento, Laura Knothe, Todd Weltner, and the Affidavit of Neil O. Anderson regarding the numerous defects in materials and workmanship as it relates to the construction of the Meridian City Hall. Rather, Petra's response is that "whatever defects the City allegedly discovered fall within the warranties" and, essentially, that these warranty issues were the City's problem. However, this position again wholly ignores Petra's fiduciary relationship with the City as well as Petra's express contractual duty to "determine that the work is being performed in accordance with the requirements of the Contract Documents ... keep the Owner informed of the progress of the Work,

and will guard the owner against defects and deficiencies in the Work.” AIA A201/CMA – 1992 §4.6.2. The presence of defects conclusively demonstrates the breach of Petra’s duties under this provision, its breach of its fiduciary duty to the City with regard to all duties imposed upon it by the CMA, and the materiality of this breach. As a result, this Court should grant the City’s Motion for Summary Judgment as to Section 4.6.2 of the AIA A201/CMA – 1992 which was expressly incorporated into the CMA.

### **CONCLUSION**

The foregoing establishes that the CMA imposed upon Petra multiple fiduciary duties in furtherance of obligation its to “act in a manner consistent” with the “relationship of trust and confidence.” These duties included, but were not limited to, the provision of a final written report under Section 4.2, the administration of the contract under Section 4.7, and the assurance of an issuance of a certificate of substantial completion under Section 9. The indisputable evidence is that Petra did not fulfill a single one of these duties under the CMA and that the City did not waive a single one of these provisions. Petra’s clear failure to comply with the express provisions of the CMA constitutes a material breach of the CMA as a matter of law and summary judgment in favor of the City as to Petra’s Liability should be granted.

DATED this 27<sup>th</sup> day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
GOURLEY, P.A.

By   
Kim J. Trout  
Attorneys for Plaintiff


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 27<sup>th</sup> day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSH O HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P.O. Box 9518  
Boise, Idaho 83707-9518  
Direct Facsimile: (208) 639-5609

Hand Delivered  
U.S. Mail  
Fax  
Email

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Kim J. Trout

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4

SEP 29 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

**KIM J. TROUT, ISB #2468**

**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.**

225 North 9th Street, Suite 820

P.O. Box 1097

Boise, ID 83701

Telephone: (208) 331-1170

Facsimile: (208) 331-1529

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**NOTICE OF DEPOSITION OF  
RICHARD BAUER (*DUCES TECUM*)**

PLEASE TAKE NOTICE that Plaintiff, The City of Meridian., by and through its counsel of record, Trout Jones Gledhill Fuhrman Gourley, P.A., will take the testimony, on oral examination, of Richard Bauer. The deposition will be taken before an officer qualified to administer oaths on the **10<sup>th</sup> day of November, 2010 at the hour of 9:00 a.m. of said day**, and thereafter from day to day as the taking of said deposition may be adjourned, at the offices of Trout Jones Gledhill Fuhrman Gourley, P.A., located at 225 N. 9<sup>th</sup> St., Ste. 820, Boise, ID 83702. This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure. You are hereby invited to appear and take part in the examination of the witness as is advisable and proper.

**NOTICE OF DEPOSITION OF RICHARD BAUER (*DUCES TECUM*)**

Page - 1

006550

YOU ARE FURTHER COMMANDED, pursuant to Rule 26(b)(4)(b) and Rule 34 of the Idaho Rules of Civil Procedure, to bring to the place above-named for the taking of said deposition and to have available for copying and inspection the any and document, picture, voice recording, video recording, in any way related to the Meridian City Hall Project, or in any way related to the claims and defenses of Petra Incorporated in the above referenced lawsuit, including but not limited to:

1. All documents<sup>1</sup> provided to you from Petra, Incorporated or from Cosho Humphrey for this matter<sup>2</sup>;
2. All documents utilized by you in the rendering of your opinion in this matter, which is stated in your affidavit dated April 30, 2010;
3. Personal notes of any employee<sup>3</sup> of Lemley International who assisted you in this matter;
4. Work notes, in electronic or other form, of any employee of Lemley International who assisted you in this matter;
5. All notes, in electronic or other form, taken by any employee of Lemley International who assisted you in this matter;
6. Meeting notes maintained by Lemley International in this matter;
7. Calendars<sup>4</sup> appointments of any employee of Lemley International who assisted you in this matter;<sup>5</sup>
8. All communication<sup>6</sup> between any employee of Lemley International and any person<sup>7</sup> related to this matter;

---

<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writings of every kind, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memoranda, reports, notebooks, binders, drawings, studies, analyses, drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio, video or sound recordings, cassette tapes, video recorded, electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

<sup>2</sup> "This matter" shall reference the New Meridian City Hall Project, which is the subject matter of this litigation.

<sup>3</sup> The term "Employee" when used in reference to Lemley International includes, but is not limited to, Jack Bauer and "various other employees of Lemley International" as stated in your affidavit dated April 30, 2010.

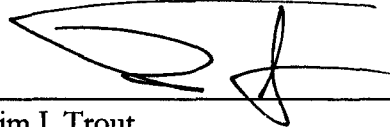
<sup>4</sup> Calendars includes, but is not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

<sup>5</sup> This request is specific for the calendar appointments related to this matter.

9. All communication between any employee of Lemley International and any employee of Petra, Incorporated or any employee of Cosho Humphrey;
10. All recordings, either voice or video, you have possession of related to this matter;
11. All photographs related to this matter;
12. All billing records related to this matter;
13. All draft memos, reports, or other documents, prepared by you or your office related to this matter;
14. Any and all agreements entered into between Petra Incorporated and Lemley International related to this matter; and
15. Any and all agreements entered into between Lemley International and Cosho Humphrey related to this matter.

DATED this 29<sup>th</sup> day of September, 2010.

Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦  
Gourley, P.A.

A handwritten signature in black ink, appearing to be 'KJ Trout', written over a horizontal line.

Kim J. Trout  
Attorney for Plaintiff

---

<sup>6</sup> "Communication" means any and all written or oral communication, including but not limited to. inter- or intra- office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings held.

<sup>7</sup> "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, or trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 29<sup>th</sup> day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

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MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
P.O. Box 9518  
Boise, ID 83707-9518  
Fax: (208) 639-5609

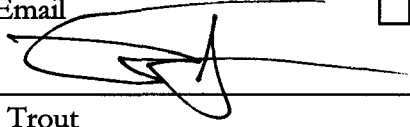
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Associated Reporting, Inc.  
1618 W. Jefferson St.  
Boise, ID 83702-5110  
Fax: (208) 343-4002

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Fax  
Fed. Express  
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\_\_\_\_\_  
Kim J. Trout



NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4-

SEP 29 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

**KIM J. TROUT, ISB #2468**  
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.  
225 North 9th Street, Suite 820  
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Boise, ID 83701  
Telephone: (208) 331-1170  
Facsimile: (208) 331-1529

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**NOTICE OF DEPOSITION OF KEITH  
PINKERTON (*DUCES TECUM*)**

PLEASE TAKE NOTICE that Plaintiff, The City of Meridian., by and through its counsel of record, Trout Jones Gledhill Fuhrman Gourley, P.A., will take the testimony, on oral examination, of Keith Pinkerton. The deposition will be taken before an officer qualified to administer oaths on the **21<sup>st</sup> day of October, 2010 at the hour of 9:00 a.m. of said day**, and thereafter from day to day as the taking of said deposition may be adjourned, at the offices of Trout Jones Gledhill Fuhrman Gourley, P.A., located at 225 N. 9<sup>th</sup> St., Ste. 820, Boise, ID 83702. This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure. You are hereby invited to appear and take part in the examination of the witness as is advisable and proper.

63

YOU ARE FURTHER COMMANDED, pursuant to Rule 26(b)(4)(b) and Rule 34 of the Idaho Rules of Civil Procedure, to bring to the place above-named for the taking of said deposition and to have available for copying and inspection any document, picture, voice recording, video recording, in any way related to the Meridian City Hall Project, or in any way related to the claims and defenses of Petra Incorporated and in any way related to the alleged "damages suffered by Petra..." in the above referenced lawsuit, including but not limited to:

1. All documents<sup>1</sup> provided to you from Petra, Incorporated or from Cosho Humphrey for this matter<sup>2</sup>. This request shall include, but not be limited to, the following specific documents:
  - a. Tax returns;
  - b. General ledgers;
  - c. Bookkeeping documents;
  - d. Source documents for accounting records;
  - e. Bank statements;
  - f. Credit card statements;
  - g. Checks;
  - h. Check registers;
  - i. Bank deposit records;
  - j. Payroll records;
  - k. Accounts receivable reports;
  - l. Accounts payable reports;
  - m. All audited or reviewed financial statement;
2. All documents utilized by you in the rendering of your opinion in this matter;
3. Personal notes of you and any employee<sup>3</sup> of Hooper Cornell who assisted you in this matter;

---

<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writings of every kind, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memoranda, reports, notebooks, binders, drawings, studies, analyses, drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio, video or sound recordings, cassette tapes, video recorded, electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.


<sup>2</sup> "This matter" shall reference the New Meridian City Hall Project, which is the subject matter of this litigation.

<sup>3</sup> The term "Employee" when used in reference to Hooper Cornell includes any employee of Hooper Cornell that assisted you in any way to the work performed.

4. Work notes, in electronic or other form, of you and any employee of Hooper Cornell who assisted you in this matter;
5. All notes, in electronic or other form, taken by you or any employee of Hooper Cornell who assisted you in this matter;
6. Meeting notes maintained by you and Hooper Cornell in this matter;
7. Calendars<sup>4</sup> and appointments of you and any employee of Hooper Cornell who assisted you in this matter;<sup>5</sup>
8. All communication<sup>6</sup> between any employee of Hooper Cornell and any person<sup>7</sup> related to this matter;
9. All communication between any employee of Hooper Cornell and any employee of Petra Incorporated or any employee of Cosho Humphrey;
10. All recordings, either voice or video, you have possession of related to this matter;
11. All billing records related to this matter;
12. All draft memos, reports, or other documents, prepared by you or your office related to this matter;
13. Any and all agreements entered into between Petra Incorporated and Hooper Cornell related to this matter; and
14. Any and all agreements entered into between Hooper Cornell and Cosho Humphrey related to this matter.

DATED this 29<sup>th</sup> day of September, 2010.

Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦  
Gourley, P.A.



Kim J. Trout  
Attorney for Plaintiff

---

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<sup>7</sup> "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, or trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

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Associated Reporting, Inc.  
1618 W. Jefferson St.  
Boise, ID 83702-5110  
Fax: (208) 343-4002

Hand Delivered ☐  
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Fax ☒  
Fed. Express ☐  
Email ☐

---

Kim J. Trout

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 4-

SEP 29 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

**KIM J. TROUT, ISB #2468**

**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.**

225 North 9th Street, Suite 820

P.O. Box 1097

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Telephone: (208) 331-1170

Facsimile: (208) 331-1529

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
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THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

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v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**NOTICE OF CONTINUED  
DEPOSITION OF JACK K. LEMLEY  
(*DUCES TECUM*)**

PLEASE TAKE NOTICE that Plaintiff, The City of Meridian., by and through its counsel of record, Trout Jones Gledhill Fuhrman Gourley, P.A., will take the continued testimony, on oral examination, of Jack Lemley. The deposition will be taken before an officer qualified to administer oaths on the **9<sup>th</sup> day of November, 2010 at the hour of 9:00 a.m. of said day**, and thereafter from day to day as the taking of said deposition may be adjourned, at the offices of Trout Jones Gledhill Fuhrman Gourley, P.A., located at 225 N. 9<sup>th</sup> St., Ste. 820, Boise, ID 83702. This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure. You are hereby invited to appear and take part in the examination of the witness as is advisable and proper.

**NOTICE OF CONTINUED DEPOSITION OF JACK K. LEMLEY (*DUCES TECUM*)**

Page - 1

006558

YOU ARE FURTHER COMMANDED, pursuant to Rule 26(b)(4)(b) and Rule 34 of the Idaho Rules of Civil Procedure, to bring to the place above-named for the taking of said deposition and to have available for copying and inspection the any and document, picture, voice recording, video recording, in any way related to the Meridian City Hall Project, or in any way related to the claims and defenses of Petra Incorporated in the above referenced lawsuit, including but not limited to:

1. All documents<sup>1</sup> provided to you from Petra, Incorporated or from Coshö Humphrey for this matter<sup>2</sup>;
2. All documents utilized by you in the rendering of your opinion in this matter, which is stated in your affidavit dated April 30, 2010;
3. Personal notes of any employee<sup>3</sup> of Lemley International who assisted you in this matter;
4. Work notes, in electronic or other form, of any employee of Lemley International who assisted you in this matter;
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6. Meeting notes maintained by Lemley International in this matter;
7. Calendars<sup>4</sup> appointments of any employee of Lemley International who assisted you in this matter;<sup>5</sup>
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<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writings of every kind, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memoranda, reports, notebooks, binders, drawings, studies, analyses, drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio, video or sound recordings, cassette tapes, video recorded, electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

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<sup>3</sup> The term "Employee" when used in reference to Lemley International includes, but is not limited to, Jack Bauer and "various other employees of Lemley International" as stated in your affidavit dated April 30, 2010.

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14. Any and all agreements entered into between Petra Incorporated and Lemley International related to this matter; and
15. Any and all agreements entered into between Lemley International and Cosho Humphrey related to this matter.

DATED this 29<sup>th</sup> day of September, 2010.

Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦  
Gourley, P.A.



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Kim J. Trout  
Attorney for Plaintiff

---

<sup>6</sup> "Communication" means any and all written or oral communication, including but not limited to. inter- or intra- office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings held.

<sup>7</sup> "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, or trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29<sup>th</sup> day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
P.O. Box 9518  
Boise, ID 83707-9518  
Fax: (208) 639-5609

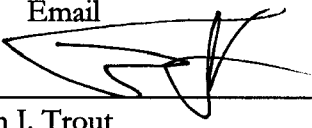
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Associated Reporting, Inc.  
1618 W. Jefferson St.  
Boise, ID 83702-5110  
Fax: (208) 343-4002

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U.S. Mail  
Fax  
Fed. Express  
Email

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\_\_\_\_\_  
Kim J. Trout



NO. \_\_\_\_\_  
A.M. \_\_\_\_\_  
FILED \_\_\_\_\_  
SEP 29 2010

**KIM J. TROUT, ISB #2468**

**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.**

225 North 9th Street, Suite 820

P.O. Box 1097

Boise, ID 83701

Telephone: (208) 331-1170

Facsimile: (208) 331-1529

**J. DAVID NAVARRO, Clerk**  
By **J. RANDALL**  
DEPUTY

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**NOTICE OF DEPOSITION OF DENNIS  
REINSTEIN (*DUCES TECUM*)**

PLEASE TAKE NOTICE that Plaintiff, The City of Meridian., by and through its counsel of record, Trout Jones Gledhill Fuhrman Gourley, P.A., will take the testimony, on oral examination, of Dennis Reinstein. The deposition will be taken before an officer qualified to administer oaths on the **27<sup>th</sup> day of October, 2010 at the hour of 9:00 a.m. of said day**, and thereafter from day to day as the taking of said deposition may be adjourned, at the offices of Trout Jones Gledhill Fuhrman Gourley, P.A., located at 225 N. 9<sup>th</sup> St., Ste. 820, Boise, ID 83702. This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure. You are hereby invited to appear and take part in the examination of the witness as is advisable and proper.

**NOTICE OF DEPOSITION OF DENNIS REINSTEIN (*DUCES TECUM*)**

Page - 1

006562

YOU ARE FURTHER COMMANDED, pursuant to Rule 26(b)(4)(b) and Rule 34 of the Idaho Rules of Civil Procedure, to bring to the place above-named for the taking of said deposition and to have available for copying and inspection any document, picture, voice recording, video recording, in any way related to the Meridian City Hall Project, or in any way related to the claims and defenses of Petra Incorporated and in any way related to the alleged "damages suffered by Petra..." in the above referenced lawsuit, including but not limited to:

1. All documents<sup>1</sup> provided to you from Petra, Incorporated or from Cosho Humphrey for this matter<sup>2</sup>. This request shall include, but not be limited to, the following specific documents:
  - a. Tax returns;
  - b. General ledgers;
  - c. Bookkeeping documents;
  - d. Source documents for accounting records;
  - e. Bank statements;
  - f. Credit card statements;
  - g. Checks;
  - h. Check registers;
  - i. Bank deposit records;
  - j. Payroll records;
  - k. Accounts receivable reports;
  - l. Accounts payable reports;
  - m. All audited or reviewed financial statement;
2. All documents utilized by you in the rendering of your opinion in this matter;
3. Personal notes of you and any employee<sup>3</sup> of Hooper Cornell who assisted you in this matter;

---

<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writings of every kind, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memoranda, reports, notebooks, binders, drawings, studies, analyses, drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio, video or sound recordings, cassette tapes, video recorded, electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

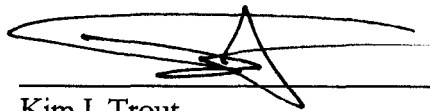
<sup>2</sup> "This matter" shall reference the New Meridian City Hall Project, which is the subject matter of this litigation.

<sup>3</sup> The term "Employee" when used in reference to Hooper Cornell includes any employee of Hooper Cornell that assisted you in any way to the work performed.

4. Work notes, in electronic or other form, of you and any employee of Hooper Cornell who assisted you in this matter;
5. All notes, in electronic or other form, taken by you or any employee of Hooper Cornell who assisted you in this matter;
6. Meeting notes maintained by you and Hooper Cornell in this matter;
7. Calendars<sup>4</sup> and appointments of you and any employee of Hooper Cornell who assisted you in this matter;<sup>5</sup>
8. All communication<sup>6</sup> between any employee of Hooper Cornell and any person<sup>7</sup> related to this matter;
9. All communication between any employee of Hooper Cornell and any employee of Petra Incorporated or any employee of Cosho Humphrey;
10. All recordings, either voice or video, you have possession of related to this matter;
11. All billing records related to this matter;
12. All draft memos, reports, or other documents, prepared by you or your office related to this matter;
13. Any and all agreements entered into between Petra Incorporated and Hooper Cornell related to this matter; and
14. Any and all agreements entered into between Hooper Cornell and Cosho Humphrey related to this matter.

DATED this 29<sup>th</sup> day of September, 2010.

Trout ♦ Jones ♦ Gledhill ♦ Fuhrman ♦  
Gourley, P.A.



Kim J. Trout  
Attorney for Plaintiff

---

<sup>4</sup> Calendars includes, but is not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

<sup>5</sup> This request is specific for the calendar appointments related to this matter.

<sup>6</sup> "Communication" means any and all written or oral communication, including but not limited to, inter- or intra- office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings held.

<sup>7</sup> "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, or trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 29<sup>th</sup> day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSH O HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
P.O. Box 9518  
Boise, ID 83707-9518  
Fax: (208) 639-5609

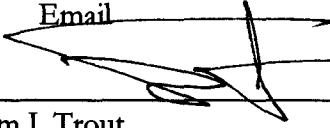
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Associated Reporting, Inc.  
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\_\_\_\_\_  
Kim J. Trout

NO  
A.M. ~~FILED~~ 4-

SEP 29 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

**KIM J. TROUT, ISB #2468**

**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.**

225 North 9th Street, Suite 820

P.O. Box 1097

Boise, ID 83701

Telephone: (208) 331-1170

Facsimile: (208) 331-1529

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-07257

**NOTICE OF SERVICE**

Pursuant to the Idaho Rules of Civil Procedure, notice is hereby given by the undersigned party that a copy of Plaintiff the City of Meridian's Fifth Set of Requests for Production of Documents to Defendant Petra Incorporated Dated September 29, 2010 was served upon the following by U.S. Mail at:

Thomas G. Walker  
COSHO HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
P.O. Box 9518  
Boise, ID 83707-9518  
[Twalker@CoshoLaw.com](mailto:Twalker@CoshoLaw.com)

**NOTICE OF SERVICE**

Page - 1

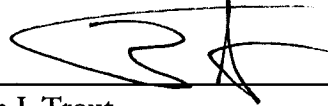
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CP

DATED this 29<sup>th</sup> day of September, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
GOURLEY, P.A.

By: \_\_\_\_\_



Kim J. Trout  
Attorneys for Plaintiff

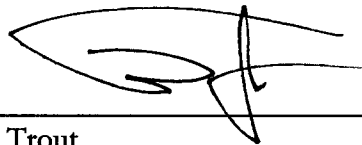
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 29<sup>th</sup> day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
P.O. Box 9518  
Boise, ID 83707-9518  
Fax: (208) 639-5609

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Fax  
Fed. Express  
Email

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Kim J. Trout

NO. \_\_\_\_\_  
A.M. 9:30 FILED P.M. \_\_\_\_\_

SEP 30 2010

By J. DAVID NAVARRO, Clerk  
INGA JOHNSON  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

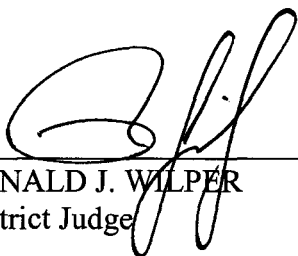
**ORDER DENYING PLAINTIFF'S  
MOTION TO DISMISS (IDAHO TORT  
CLAIMS ACT)**

Plaintiff, City of Meridian's Motion to Dismiss (Idaho Tort Claims Act) came before this Court on September 27, 2010. The Court having considered the motion, affidavits, memoranda and counsels' oral arguments and good cause appearing therefor;

IT IS ORDERED as follows:

The City of Meridian's Motion to Dismiss (Idaho Tort Claims Act) is DENIED.

DATED: September 29<sup>th</sup>, 2010



---

RONALD J. WILPER  
District Judge



### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 30 day of September, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☐ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☒ Facsimile: -331 529  
☐ E-mail:

Thomas G. Walker, Esq.  
Cosho Humphrey, LLP  
800 Park Blvd.,  
Suite 790  
P.O. Box 9518  
Boise, Idaho 83707-9518

☐ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☒ Facsimile: 634-5609  
☐ E-mail:

J. DAVID NAVARRO

INGA JOHNSON

~~THOMAS G. WALKER~~

SEP 30 2010

J. DAVID NAVARRO, Clerk  
By \_\_\_\_\_  
DEPUTY CLERK  
ANGA JOHNSON

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
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E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**ORDER DENYING PLAINTIFF'S  
MOTION IN LIMINE RE: EXPERT  
TESTIMONY OF BENNETT,  
COUGHLIN AND FRANK**

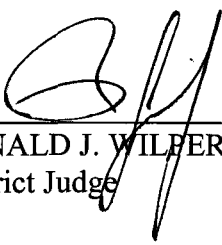
Plaintiff, City of Meridian's Motion in Limine Regarding Expert Testimony of Eugene Bennett, Thomas Coughlin and Jerald Frank, came before this Court on September 27, 2010. The Court having considered the motion, affidavits, memoranda and counsels' oral arguments

and good cause appearing therefor;

IT IS ORDERED as follows:

The City of Meridian's Motion in Limine Regarding Expert Testimony of Eugene Bennett, Thomas Coughlin and Jerald Frank is DENIED.

DATED: September 29<sup>th</sup>, 2010



---

RONALD J. WILFER  
District Judge

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 30 day of September, 2010, a true and correct copy

of the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Overnight Courier
- ☒ Facsimile:
- ☐ E-mail:

Thomas G. Walker, Esq.  
Cosho Humphrey, LLP  
800 Park Blvd.,  
Suite 790  
P.O. Box 9518  
Boise, Idaho 83707-9518

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Overnight Courier
- ☒ Facsimile:
- ☐ E-mail:

J. DAVID NAVARRO

INGA JOHNSON

~~THOMAS G. WALKER~~

NO. \_\_\_\_\_  
A.M. 9:30 FILED P.M. \_\_\_\_\_

SEP 30 2010

J. DAVID NAVARRO, Clerk  
By INGA JOHNSON  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
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E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

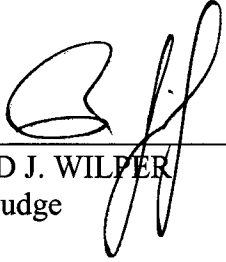
**ORDER DENYING PLAINTIFF'S  
MOTION IN LIMINE RE: EXPERT  
TESTIMONY OF JACK K. LEMLEY**

Plaintiff, City of Meridian's Motion in Limine Regarding Expert Testimony of Jack K. Lemley came before this Court on September 27, 2010. The Court having considered the motion, affidavits, memoranda and counsels' oral arguments and good cause appearing therefor;

IT IS ORDERED as follows:

The City of Meridian's Motion in Limine Regarding Expert Testimony of Jack K. Lemley is DENIED.

DATED: September <sup>25<sup>th</sup></sup>21, 2010



---

RONALD J. WILPER  
District Judge

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 30 day of September, 2010, a true and correct copy

of the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☐ U.S. Mail  
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☒ Facsimile: —  
☐ E-mail:

Thomas G. Walker, Esq.  
Cosho Humphrey, LLP  
800 Park Blvd.,  
Suite 790  
P.O. Box 9518  
Boise, Idaho 83707-9518

☐ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☒ Facsimile: — 639-5609  
☐ E-mail:

J. DAVID NAVARRO

~~THOMAS G. WALKER~~ INGA JOHNSON

ORIGINAL

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A.M. \_\_\_\_\_ P.M. 3:27

OCT 04 2010

J. DAVID NAVARRO, Clerk  
By CARLY LATIMORE  
DEPUTY

Thomas G. Walker (ISB 1856)  
Erika Klein (ISB 5509)  
Mackenzie Whatcott (ISB 6774)  
Matthew Schelstrate (ISB 8276)  
COSHO HUMPHREY, LLP  
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E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com)  
[mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com).

Attorneys for Defendant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant.

Case No. CV OC 0907257

**PETRA INCORPORATED'S NOTICE  
OF WITHDRAWAL OF PETRA'S  
SECOND DISCLOSURE OF EXPERT  
WITNESSES DATED SEPTEMBER 14,  
2010**

Petra Incorporated ("Petra"), by and through its attorneys of record, Thomas G. Walker of the firm of Cosho Humphrey, LLP, notifies this Court and counsel for the City of Meridian, that it withdraws its Second Disclosure of Expert Witnesses dated September 14, 2010 and

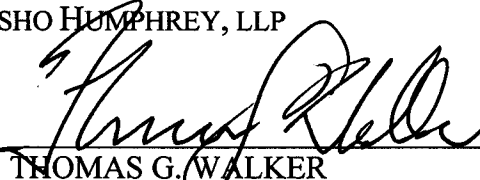


further advises, that it will not by relying on Jerald Frank, Eugene Bennett, Thomas Coughlin or John Quapp as expert witnesses at trial.

DATED: October 4, 2010.

COSHO HUMPHREY, LLP

By:

  
THOMAS G. WALKER

Attorneys for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 4<sup>th</sup> day of October, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

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<input type="checkbox"/>	Overnight Courier
<input checked="" type="checkbox"/>	Facsimile:
<input type="checkbox"/>	E-mail:

  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_  
1:22

OCT 8 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

Thomas G. Walker (ISB 1856)  
Erika Klein (ISB 5509)  
Mackenzie Whatcott (ISB 6774)  
Matthew Schelstrate (ISB 8276)  
COSHO HUMPHREY, LLP  
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E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com)  
[mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com).

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**NOTICE OF TAKING OF THE AUDIO-  
VIDEO DEPOSITION OF THE CITY  
OF MERIDIAN, *DUCES TECUM*,  
PURSUANT TO I.R.C.P. 30(b)(4) AND  
30(b)(6) – CLAIMS OTHER THAN  
DAMAGES**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEYS OF RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated  
("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon

NOTICE OF TAKING OF THE AUDIO-VIDEO DEPOSITION OF THE CITY OF MERIDIAN, *DUCES  
TECUM*, PURSUANT TO I.R.C.P. 30(b)(4) AND 30(b)(6) – CLAIMS OTHER THAN DAMAGES  
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Page 1

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oral examination pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure, of Theodore W. Baird, Jr. ("Baird"), the person designated by the City of Meridian ("Meridian" or "City") as the most knowledgeable regarding the allegations by the City set forth in paragraphs 4 through 21 of the City's Complaint filed on April 16, 2009, and as claimed in paragraphs 4 through 19, 23, 26 through 28, 31 through 37, 40 through 47, 50 through 52, and 55 of the City's proposed First Amended Complaint. According to the City's designation, Baird is the person most knowledgeable regarding: (1) the facts the City claims support Petra's alleged breach of contract, (2) the facts the City claims support Petra's alleged breach of the covenant of good faith and fair dealing, (3) the facts the City claims support Petra's alleged unjust enrichment, (4) the facts the City claims support Petra's alleged fraud and fraud in the inducement, (5) the facts the City claims support Petra's alleged constructive fraud, (6) the facts the City claims support Petra's alleged gross negligence, and (7) the facts the City claims support Petra's alleged oppressive, malicious, fraudulent or outrageous conduct.

The primary objective of the Rule 30(b)(6) deposition is to inquire of Baird who may testify regarding the foregoing matters at trial.

The deposition will be taken on **October 21, 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed.

The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video

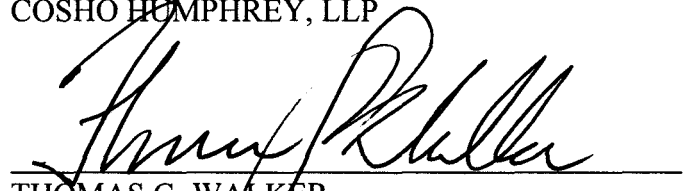
means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires Baird to produce and make available for inspection and copying at the deposition all documents supporting the City of Meridian's claims described above.

This deposition will be taken pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter. The attorney taking the deposition or an employee of Cosho Humphrey, LLP may operate the audio-video equipment.

DATED: October 8, 2010.

COSHO HUMPHREY, LLP

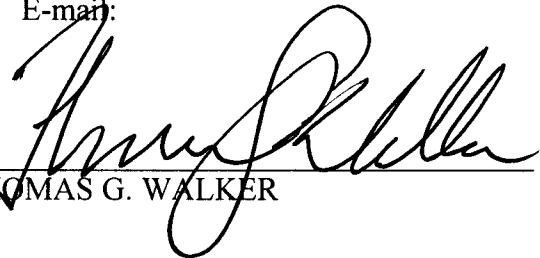
  
THOMAS G. WALKER  
Attorneys for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 8<sup>th</sup> day of October, 2010, a true and correct copy of the within and foregoing Notice of Taking Audio Video Deposition, *Duces Tecum*, was served upon:

Kim J. Trout, Esq.  
Daniel L. Glynn, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Overnight Courier
- ☒ Facsimile:
- ☐ E-mail:

  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 1:22

OCT 8 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

Thomas G. Walker (ISB 1856)  
Erika Klein (ISB 5509)  
Mackenzie Whatcott (ISB 6774)  
Matthew Schelstrate (ISB 8276)  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com)  
[mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com).

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**NOTICE OF TAKING OF THE AUDIO-  
VIDEO DEPOSITION OF THE CITY  
OF MERIDIAN, *DUCES TECUM*,  
PURSUANT TO I.R.C.P. 30(b)(4) AND  
30(b)(6) – DAMAGES**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEYS OF RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated  
("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon

oral examination pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure, of Steven J. Amento ("Amento"), the person designated by the City of Meridian ("Meridian" or "City") as the most knowledgeable regarding the damages that the City has allegedly suffered as claimed in paragraph 22 of the City's Complaint filed on April 16, 2009, and as claimed in paragraphs 20, 24, 38, 48, 53, and 55 of the City's proposed First Amended Complaint. According to the City's designation, Amento is the person most knowledgeable regarding: (1) each element of damage, (2) the amount of damage arising with respect to each element, (3) the method of calculating the amount of damage arising with respect to each element, (4) the assumptions underlying the calculation of the amount of damage arising with respect to each element, and (5) the cause or causes of the damage arising with respect to each element. Further, according to the City, Amento is the most knowledgeable person regarding the unjust enrichment claim set forth in paragraph 29 of the City's proposed First Amended Complaint, including (1) each element of unjust enrichment, (2) the amount of unjust enrichment arising with respect to each element, (3) the method of calculating the amount of unjust enrichment arising with respect to each element, (4) the assumptions underlying the calculation of the amount of unjust enrichment arising with respect to each element, and (5) the cause or causes of the unjust enrichment arising with respect to each element. The primary objective of the Rule 30(b)(6) deposition is to inquire of Amento who may testify regarding the foregoing matters at trial.

The deposition will be taken on **October 25, 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed.

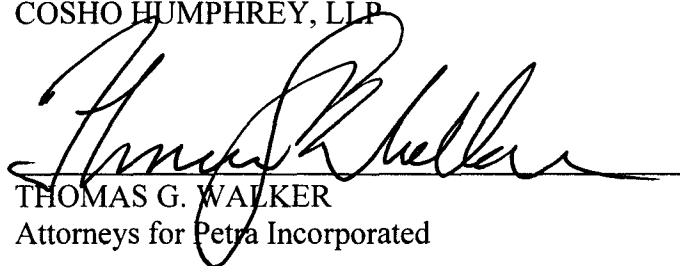
The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires Amento to produce and make available for inspection and copying at the deposition all documents supporting the City of Meridian's claims of damages and unjust enrichment.

This deposition will be taken pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter. The attorney taking the deposition or an employee of Cosho Humphrey, LLP may operate the audio-video equipment.

DATED: October 8, 2010.

COSHO HUMPHREY, LLP



THOMAS G. WALKER  
Attorneys for Petra Incorporated




### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 8<sup>th</sup> day of October, 2010, a true and correct copy of the within and foregoing Notice of Taking Audio Video Deposition, *Duces Tecum*, was served upon:

Kim J. Trout, Esq.  
Daniel L. Glynn, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Overnight Courier
- ☒ Facsimile:
- ☐ E-mail:

  
\_\_\_\_\_  
THOMAS G. WALKER

OCT 14 2010

J. DAVID NAVARRO, Clerk  
By CARLY LATIMORE  
DEPUTY

KIM J. TROUT, ISB #2468  
DANIEL LORAS GLYNN, ISB #5113  
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.  
225 North 9th Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701  
Telephone: (208) 331-1170  
Facsimile: (208) 331-1529

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**PLAINTIFF'S MOTION FOR ORDER  
APPROVING PERMISSION TO APPEAL  
FROM AN INTERLOCUTORY ORDER  
PURSUANT TO IDAHO APPELLATE  
RULE 12**

COMES NOW the Plaintiff City of Meridian, by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., and, pursuant to Idaho Appellate Rule 12, hereby moves this Court to enter an order approving permission to appeal the Court's Order denying Plaintiff's Motion to Dismiss Defendant's Counterclaim pursuant to the Idaho Tort Claims Act entered September 29, 2010. This motion is supported by Plaintiff's Memorandum in Support filed contemporaneously herewith and the papers and pleadings on record in this matter.

Oral argument is requested.

DATED this 14 day of October, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.

By:   
Daniel Loras Glynn  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 14 day of October, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
P.O. Box 9518  
Boise, ID 83707-9518  
Fax: (208) 639-5609

Hand Delivered  
U.S. Mail  
Fax  
Fed. Express  
Email

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Daniel Loras Glynn

OCT 14 2010

**KIM J. TROUT, ISB #2468**  
**DANIEL LORAS GLYNN, ISB #5113**  
**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.**  
 225 North 9th Street, Suite 820  
 P.O. Box 1097  
 Boise, ID 83701  
 Telephone: (208) 331-1170  
 Facsimile: (208) 331-1529

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV OC 09-7257

v.

**AFFIDAVIT OF DANIEL LORAS  
GLYNN IN SUPPORT OF PLAINTIFF'S  
MOTION FOR ORDER APPROVING  
PERMISSION TO APPEAL FROM AN  
INTERLOCUTORY ORDER  
PURSUANT TO IDAHO APPELLATE  
RULE 12**

Defendant.

STATE OF IDAHO )  
 ) :ss  
County of ADA )

DANIEL LORAS GLYNN, being duly sworn upon oath, deposes and says:

1. I am at least eighteen (18) years of age and am competent to testify regarding the matters set forth herein.

2. I am a member of the law firm of TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A., representing the Plaintiff in this matter, and I make the following statements based upon my own personal knowledge.

AFFIDAVIT OF DANIEL LORAS GLYNN IN SUPPORT OF PLAINTIFF'S MOTION FOR ORDER  
APPROVING PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER PURSUANT TO IDAHO  
APPELLATE RULE 12 - 1

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3. Attached hereto as Exhibit "A," and fully incorporated herein by this reference, is a true and correct copy of the transcript of the September 27, 2010 Hearing, wherein the Court provided its reasoning for the denial of Plaintiff's Motion to Dismiss.

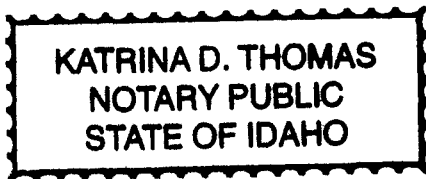
FURTHER YOUR AFFIANT SAYETH NAUGHT.


TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
GOURLEY, PA

By:

  
Daniel Loras Glynn

Subscribed and sworn to before me this 14<sup>th</sup> day of October, 2010.



  
Notary Public, State of Idaho  
Residing at: Boise, ID  
My commission expires: 5/22/12


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 14<sup>th</sup> day of October, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P.O. Box 9518  
Boise, Idaho 83707-9518  
Direct Facsimile: (208) 639-5609

Hand Delivered  
U.S. Mail  
Fax  
Email

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Daniel Loras Glynn

# EXHIBIT A

<p>1 DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT</p> <p>2 IN AND FOR THE COUNTY OF ADA</p> <p>3 ----- x Case No. CVOC-09-07257</p> <p>4 THE CITY OF MERIDIAN, an Idaho : Municipal Corporation, :</p> <p>5 : MOTION HEARING Plaintiff/Counterdefendant, :</p> <p>6 vs. :</p> <p>7 PETRA INCORPORATED, an Idaho : corporation, :</p> <p>8 Defendant/Counterclaimant. :</p> <p>9 ----- x</p> <p>10 REPORTER'S TRANSCRIPT OF PROCEEDINGS</p> <p>11 Held on September 27, 2010, before 12 Ronald J. Wilper, District Court Judge.</p> <p>13 APPEARANCES</p> <p>14 For Plaintiff/Counterdefendant 15 Kim J. Trout 16 TROUT JONES GLEDHILL FUHRMAN, P.A. 17 225 North 9th Street, Suite 820 18 Boise, Idaho 83701</p> <p>19 For Defendant/Counterclaimant Petra 20 Thomas G. Walker 21 COSHO HUMPHREY, LLP 22 800 Park Blvd., Suite 790 23 Boise, Idaho 83707-9518</p> <p>24 Reported by 25 Dianne E. Cromwell CSR No. 21</p> <p style="text-align: right;">Page 1</p>	<p>1 would put a reasonably prudent person on inquiry 2 notice, it triggers the 180-day period.</p> <p>3 That's a direct quote from McQuillen 4 versus the City of Ammon at 113 Idaho 719, 5 page 722.</p> <p>6 Now, when you put that into the context 7 of our case, Judge, the question is: When would a 8 reasonably prudent person in Petra's position know 9 of facts giving rise to their claim? And the 10 answer is, on or about January 15, 2007.</p> <p>11 The benefit of having this hearing in 12 near proximity to our last hearing, Judge, is that 13 the court has the benefit of having seen Petra's 14 cost estimate, the first of which was submitted on 15 January 15 of 2007 and which was approximately I 16 think \$3 million greater than the amounts stated 17 in the construction management agreement.</p> <p>18 Now, since we all know and have known 19 from the day that Petra filed its counterclaim in 20 this matter that their claim is based in principle 21 part on the increased cost of this project, it 22 isn't necessarily when a reasonably prudent person 23 would have known. It's when Petra in its 24 fiduciary capacity as a construction expert 25 providing a cost estimate to the city, which</p> <p style="text-align: right;">Page 3</p>
<p>1 BOISE, IDAHO</p> <p>2 September 27, 2010, 1:37 p.m.</p> <p>3</p> <p>4 THE COURT: We'll take up Meridian versus 5 Petra, CVOC-09-07257. This is the time scheduled 6 for hearing on Meridian's motion to dismiss and 7 both parties have motions in limine.</p> <p>8 Mr. Walker appears on behalf of the 9 Defendant Petra. Mr. Trout appears on behalf of 10 the Plaintiff City of Meridian.</p> <p>11 Mr. Trout, I guess you're up on your 12 motion to dismiss on the tort claim issue.</p> <p>13 MR. TROUT: Thank you, Judge. Good 14 afternoon, Your Honor.</p> <p>15 THE COURT: Good afternoon.</p> <p>16 MR. TROUT: Your Honor, I think the 17 fundamentals of this motion are very clear. As a 18 matter of fact, Petra has never provided a tort 19 claim notice pursuant to 5219 or Title 6 to the 20 city. That fact is undisputed in this matter. 21 And the significance of that fact I think is borne 22 out by both the statute and the case law in the 23 state of Idaho.</p> <p>24 The case law specifically requires that 25 once a party has, quote, knowledge of facts which</p> <p style="text-align: right;">Page 2</p>	<p>1 claims their fee is based as a percentage of cost, 2 knew or should have known.</p> <p>3 And there's little doubt that 4 January 15 of 2007 is the first key date for the 5 court to consider, and as it states in the 6 McQuillen versus City of Ammon case, that's the 7 date that triggers the 180-day requirement.</p> <p>8 If you forget about that date, if you 9 forget about February 12, the second cost 10 estimate, if you forget about April 3, the third 11 cost estimate, and you forget about July 12, 2007, 12 the fourth cost estimate, you could look to a 13 second unequivocal date, which is November 5, 2007 14 where Petra submits, quote/unquote, it's notice of 15 change order for an increase in their fee.</p> <p>16 If you ignored the first four dates, 17 you can't ignore November 5, and the 180-day 18 period would start there. And contrary to the 19 position that I expect Mr. Walker to take, which 20 is the same one he espoused at the prior hearing, 21 we didn't know we had a claim until the city 22 denied payment. Well, that's not what the case 23 law says, and it's not what the statute says.</p> <p>24 And in fact, in Mitchell versus Bingham 25 Memorial Hospital, which we cited to the court at</p> <p style="text-align: right;">Page 4</p>

<p>1 130 Idaho 420, page 423, it specifically states:  2 "A claimant is not required to know all the facts  3 and details of a claim because such a prerequisite  4 would allow the claimant to delay completion of  5 their investigation before triggering the notice  6 requirement."  7 If you followed Petra's argument that  8 we didn't know it was a claim until the city  9 denied payment, then that's exactly what the court  10 said you cannot do in the Mitchell case because  11 Petra could control the timeframe in which it  12 asked for payment and hence received the denial.  13 And that's clearly not the purpose of  14 the statute. And in fact, the purpose of the  15 statute as stated in the Pounds decision is  16 exactly why in this circumstance with this set of  17 facts the act has to be strictly enforced.  18 In order to serve the primary purpose  19 of the act and to, quote, save needless expense  20 and litigation by providing an opportunity for  21 amicable resolution of the differences between the  22 parties, then notice must be given and it must be  23 given early.  24 And under this set of circumstances, I  25 find it either disingenuous or impossible to</p> <p style="text-align: right;">Page 5</p>	<p>1 legislature chose not to follow the federal  2 format.  3 And as a result, we have case law in  4 our state, the Knudsen decision, Knudsen versus  5 Agee at 128 Idaho 776, which specifically says the  6 court would not look to a federal court  7 interpretation of a federal statute -- in that  8 case a wiretap statute -- for the creation of a  9 discovery exception where a similar state statute  10 does not expressly contain such an exception.  11 We have an identical situation here,  12 and the filing of the counterclaim simply doesn't  13 meet the standard, and there's a good reason.  14 The good reason is, the same principle  15 espoused in the Pounds decision that identifies  16 the whole purpose for giving a notice and giving  17 it early. Give the parties a fair opportunity to  18 resolve this, give the city an opportunity to  19 begin their investigation not in 2009 but in 2007,  20 specifically in January of 2007 when they should  21 have given notice of the increase in fee to begin  22 with under their fiduciary responsibility to the  23 city.  24 It's for those reasons, Your Honor,  25 that we respectfully ask that the court apply as</p> <p style="text-align: right;">Page 7</p>
<p>1 believe that if as stated in the multiple  2 affidavits submitted to the court and the multiple  3 pleadings submitted to the court, Petra knew from  4 the time they signed this contract that their fee  5 was going to be based on a percentage of total  6 cost, which is what the mantra has been from day  7 one. It's always been 4.7 percent of the cost.  8 If in fact that's true, then on  9 January 15, 2007 they knew they had a claim for an  10 increase in the amount of their fee, and the  11 180-day notice provision was triggered, and they  12 must have given the notice within that period of  13 time.  14 I'll address two additional points.  15 The first point is, Petra is going to assert that  16 while the federal statute says a counterclaim is  17 sufficient notice, and therefore, the state ought  18 to follow the federal rule.  19 Well, unfortunately we have to give due  20 deference to the legislature who is presumed to  21 know what it is doing and what the state of the  22 law is, and at the time they passed 5219 and the  23 Idaho Tort Claims Act, the federal statute was in  24 existence and allowed by statute a counterclaim to  25 be sufficient to comply. And the Idaho</p> <p style="text-align: right;">Page 6</p>	<p>1 the Supreme Court has the tort claims notice in  2 5219 to dismiss all of Petra's claims with  3 prejudice. Thank you.  4 THE COURT: Thank you very much, Mr. Trout  5 Mr. Walker?  6 MR. WALKER: Thank you, Your Honor. Well,  7 here we are, Your Honor, more than 17 months of  8 litigating this case and after the parties have  9 incurred more than a million dollars in costs and  10 fees, Meridian asserts it was not sufficiently put  11 on notice of Petra's damages claim against the  12 city because it failed to file a claim under  13 Idaho Code Section 50-219 and 6-901 and the  14 following subsections.  15 Well, first of all, Your Honor, the  16 counterclaim for the construction manager's fee  17 and the reimbursable expenses seeks specific  18 performance of the construction management  19 agreement, not money damages.  20 So Petra's counterclaim in that regard  21 does not fall within the purview of the Idaho Tort  22 Claims Act. Now, admittedly, Your Honor, Petra's  23 claims for lost past and future earnings and lost  24 business and investment opportunities are a claim  25 for damages, but as I'll point out in a minute,</p> <p style="text-align: right;">Page 8</p>



<p>1 Your Honor, Petra substantially complied with the 2 Idaho Tort Claims Act in any event.</p> <p>3 Now, back to the equitable adjustment 4 language in paragraph 7 of the construction 5 management agreement. That paragraph provides 6 that a change shall entitle the construction 7 manager to an equitable adjustment in the schedule 8 of performance, the construction manager's fees, 9 and/or the not-to-exceed limits for reimbursable 10 expenses. So the essence, Your Honor, of Petra's 11 claim is equitable in nature and not one for money 12 damages.</p> <p>13 And as I mentioned, so the bottom line 14 with respect to the request for the construction 15 manager's fee and the expenses are simply a 16 request that the court specifically enforce the 17 contract.</p> <p>18 Now, in this regard, Idaho Code 19 Section 50-219 states that, "All claims for 20 damages against the city must be filed as 21 prescribed by Chapter 9, Title 6 Idaho Code." 22 Idaho Code Section 6-904 provides that, "A claim 23 means any written demand to recover money damages 24 from a governmental entity or its employee, which 25 any person is legally entitled to recover under</p> <p style="text-align: right;">Page 9</p>	<p>1 management agreement, paragraph 8.1 of the 2 agreement states, and I quote: "In the event that 3 any claim, dispute, or other matter in question 4 between the owner and construction manager arising 5 out of or related to this agreement or breach 6 hereof ('a claim'), owner and construction manager 7 shall first endeavor to resolve the claim through 8 direct discussions."</p> <p>9 So, Your Honor, applying the canon of 10 construction used ejusdem generis, which means, as 11 the court knows, of the same class, and more 12 particularly it means when a general word or 13 phrase proceeds or follows a list of specifics, 14 the general word or phrase will be interpreted to 15 include only those items of the same type as those 16 listed.</p> <p>17 And the second legal principle of 18 construction, noscitur a sociis, which means that 19 words are known by the company they keep, and 20 we've cited the court to Idaho Supreme Court case 21 State versus Richards with regard to that. These 22 two canons of construction confirm that a matter 23 is not a claim under the construction management 24 agreement until it is disputed.</p> <p>25 Now, regarding the construction or the</p> <p style="text-align: right;">Page 11</p>
<p>1 this act as compensation for the negligent or 2 otherwise wrongful act or omission of the 3 governmental entity or its employee."</p> <p>4 So putting the equitable adjustment 5 language in the equitable remedy aside, let's look 6 at Petra's substantial compliance with the Idaho 7 Torts Claims Act.</p> <p>8 As Mr. Trout mentioned in his argument, 9 Petra's position is is that the claim didn't arise 10 until change order number 2 was denied on 11 February 24, 2009. So at the outset, it's 12 necessary for us to determine what constitutes a 13 claim in this case.</p> <p>14 And there are four sources, Your Honor, 15 that lead us to the determination that change 16 order number 2 was not a claim until it was 17 denied.</p> <p>18 The first source is the construction 19 management agreement itself. The second source is 20 the custom and practice in the construction 21 industry. The third source is the party's course 22 of dealing during the project period, and the 23 fourth source is the definition of claim contained 24 in the Idaho Tort Claims Act itself.</p> <p>25 Now, regarding the construction</p> <p style="text-align: right;">Page 10</p>	<p>1 custom and practice in the industry, as Mr. Bauer, 2 our expert, our construction management expert, 3 stated in his September 13, 2010 affidavit at 4 paragraph 45, and I quote: "My review of the 5 affidavits and documents filed and served by the 6 city in this case indicates that the city asserts 7 that Petra's change order number 2 is a claim. 8 This is incorrect under the standards applicable 9 to contractors and construction managers. A 10 change order request does not become a claim until 11 it is denied by the owner.</p> <p>12 "Likewise, the construction management 13 agreement defines a claim as a 'dispute or other 14 matter in question.'"</p> <p>15 Now, moving on, Your Honor, to the 16 third source, the parties' course of dealing 17 during the project period. Now, the parties did 18 not treat change order number 1 as a claim that 19 triggered the mediation provisions of 20 paragraph 8.2. Change order number 1 was 21 submitted after the contaminated and unsuitable 22 soil was removed and the city paid an additional 23 construction management fee to Petra for managing 24 that removal project.</p> <p>25 In addition, Your Honor, no other</p> <p style="text-align: right;">Page 12</p>

<p>1 contractor change order -- and there was some 150 2 of them -- was treated as a claim subject to 3 mediation. 4 Now, finally moving to the statute, 5 Your Honor, the fourth source. The definition of 6 claim is contained in Idaho Code Section 6-902, 7 and it reads, and I've already alluded to part of 8 this: "Claim means any written demand to recover 9 money damages from a governmental entity or its 10 employee, which any person is legally entitled to 11 recover under this act as compensation for the 12 negligent or otherwise wrongful act or omission of 13 the governmental entity or its employees when 14 acting within the course and scope of his 15 employment." 16 It's clear, Your Honor, that neither 17 Petra's submission of change order number 2, nor 18 the city's request for additional information 19 which took place prior to February 24, 2009, was 20 wrongful. It's simply the matter of dealing with 21 the change order in the ordinary course. 22 So, Your Honor, our position is that 23 the claim arose on February 24, 2009, the date 24 that Meridian refused to pay the change order. 25 And the time for filing the notice under the Idaho</p> <p style="text-align: right;">Page 13</p>	<p>1 occurred, those events of notice occurred, prior 2 to the expiration of the 180 days. 3 Now, in looking at the purpose of the 4 statute, the Court of Appeals in Cox versus City 5 of Sandpoint, which we've cited in our briefing, 6 the court explained, and I quote: "The primary 7 function of notice under the Idaho Tort Claims Act 8 is to put the government entity on notice that a 9 claim against it is being prosecuted and thus 10 apprise it of the need to preserve evidence and 11 perhaps prepare a defense." 12 There's no suggestion here at this 13 point, Your Honor, that Meridian was not able to 14 preserve evidence and prepare a defense. There's 15 no suggestion that Meridian was blind-sided by 16 Petra's claims and not afforded the opportunity to 17 address each and every one of them outside of 18 litigation. 19 On the contrary, Your Honor. While my 20 request for mediation made on behalf of Petra was 21 pending, the city brought this matter into court 22 by filing its complaint on April 16, 2009. And 23 they did this, the city did this, notwithstanding 24 the requirement in the construction management 25 agreement that, quote, all claims shall be subject</p> <p style="text-align: right;">Page 15</p>
<p>1 statutes began to run on that date. 2 So focusing on that date, then Petra 3 substantially complied with the notice 4 requirements under the Idaho statutes, and that 5 position is supported by my March 16, 2009 letter 6 to Bill Nary, the city attorney, requesting 7 mediation. And that was sent certainly within 180 8 days. That was sent within 20 days of the change 9 order was denied and the claim arose. 10 In addition to that, Petra filed and 11 served its answer and counterclaim on May 6, 2009, 12 which is also within the 120-day -- or 180-day 13 period, setting forth its damages claims and its 14 claims with respect to the construction management 15 fee and reimbursable expenses. 16 Now, additionally, and this is germane 17 to the cases cited in our briefing, there were 18 substantial communications between Mr. Trout and I 19 regarding this matter early on in the case and 20 certainly before the 180 days expired. 21 And finally, Your Honor, Petra filed 22 and served its first amended answer and 23 counterclaim on August 21, 2009, which was also 24 within the 180-day period that expired on 25 August 23 of 2009. So all three of those events</p> <p style="text-align: right;">Page 14</p>	<p>1 to mediation as a condition precedent to the 2 institution of legal or equitable proceedings by 3 either party. Requests for mediation shall be 4 filed in writing with the other party to this 5 agreement." And it required that it be filed 6 within 21 days, and we complied with that by my 7 letter of March 16, 2009 which was served on the 8 city attorney Bill Nary on March 16. 9 And, Your Honor, despite the 10 requirement that the city mediate and despite our 11 request for mediation, the city refused to 12 mediate. 13 In addition, the notice requirements of 14 the Idaho Tort Claims Act do not apply to 15 counterclaims in our judgment, Your Honor, 16 particularly compulsory counterclaims that are 17 filed within the 180-day period. Now, there's no 18 published opinion in Idaho holding that the notice 19 requirements of the Idaho Tort Claims Act apply to 20 counterclaims. However, other jurisdictions and 21 notably Oregon, our sister state, have addressed 22 this issue, and they've answered that a 23 counterclaim satisfies the acts requirements. 24 In the Oregon case, Urban Renewal 25 Agency of the City of Coos Bay versus Lacky, 275</p> <p style="text-align: right;">Page 16</p>

<p>1 Oregon 35, a 1976 case, the Oregon court recited 2 the purposes of the Oregon tort claim statute, 3 which is identical in essence to the Idaho tort 4 claim statute. 5 And the court stated: "The purpose of 6 the statute is, one, to save needless expense and 7 litigation by providing an opportunity for 8 amicable resolution of the differences between the 9 parties, as in mediation; two, allow authorities 10 to conduct a full investigation into the cause of 11 the injury in order to determine the extent of the 12 state's liability, if any; and third, to allow the 13 state to prepare defenses." 14 Now, Your Honor, we've stated several 15 other reasons in our briefing supporting our 16 opposition to the city's motion to dismiss based 17 upon the Idaho Tort Claims Act, and we'll rely on 18 our briefing for the balance of our argument. 19 THE COURT: Mr. Walker, just so I'm certain 20 about your argument, now, to the extent that your 21 counterclaim seeks specific performance of the 22 contract, your contention is that that portion of 23 your claim is not subject to the Tort Claim Act in 24 any effect. 25 MR. WALKER: Correct.</p> <p style="text-align: right;">Page 17</p>	<p>1 August 21 the second one. 2 THE COURT: And both of them are within six 3 months if, again, the clock starts ticking on that 4 180-day time period on March 16. 5 MR. WALKER: February 24, 2009. Yes, 6 Your Honor. 7 THE COURT: That's what I meant. Thank you 8 very much, counsel. 9 And, Mr. Trout, it's your motion, so 10 I'll give you the final word on this issue. 11 MR. TROUT: I would like to show the court a 12 couple of things if I can. 13 First of all, Your Honor, I think it's 14 fundamentally important to recognize that this 15 whole notion of equitable is, and I'll use another 16 Latin term, ipse dixit, I say it, therefore it is. 17 And there is no question that what 18 Petra seeks as a result of it's, quote/unquote, 19 claim or, quote/unquote, action for specific 20 performance, is money. They're not asking us to 21 specifically perform in any other fashion but to 22 provide money in a very large amount. 23 And so if we're going to look at what 24 they're talking about in section 7 for specific 25 performance, let's just take an example. Then</p> <p style="text-align: right;">Page 19</p>
<p>1 THE COURT: It's a contract-based cause of 2 action, not a tort. And with respect to the 3 counterclaims alleging negligence, and so forth, 4 in seeking and containing a prayer for relief 5 seeking damages sounding in tort, your contention 6 is that your cause of action didn't accrue until 7 February of '09 when your claim was denied or when 8 your requests for additional moneys for change 9 order number 2 was actually denied, and that would 10 trigger your cause of action sounding in tort. 11 And then your letter of the 16th of March 12 constituted compliance with the Tort Claim Act. 13 MR. WALKER: Correct, and also compliance 14 with the construction management agreement. 15 THE COURT: And in any event, if the court 16 were to follow the authority that you've cited, 17 the persuasive authority that you have cited from 18 the state of Oregon, a compulsory counterclaim 19 wouldn't be subject to the Tort Claim Act in any 20 event. 21 MR. WALKER: Or it would satisfy the notice 22 requirements, Your Honor. 23 THE COURT: Right. And that was filed on 24 May 6. 25 MR. WALKER: May 6 the first one and</p> <p style="text-align: right;">Page 18</p>	<p>1 they have to satisfy the conditions precedent to 2 any kind of claim for specific performance under 3 any interpretation of contract law. 4 And let's take a look at what the 5 specific provision is. This is in section 7. 6 This is the, quote/unquote, equitable adjustment 7 section that was just cited to you by Petra, and 8 it says: "Prior to providing any additional 9 services, the construction manager shall notify 10 the owner of the proposed change in services and 11 receive the owner's approval for the change." 12 There was no evidence in this case that 13 that was complied with with respect to section 7. 14 None, zero, no evidence. 15 And there is no evidence that can be 16 created today to show compliance with that 17 specific condition precedent. 18 THE COURT: Well, Mr. Trout, as I understood 19 the purpose of the hearing, your motion to dismiss 20 was premised on your contention that Petra failed 21 to comply with the Tort Claim Act. What you're 22 arguing here is that they failed -- that really 23 their claims, their contract claims, should be 24 dismissed based on their failure to satisfy this 25 condition precedent contained in the contract.</p> <p style="text-align: right;">Page 20</p>

<p>1 MR. TROUT: It's actually two-fold. Since 2 counsel raised the argument in terms of the nature 3 of the claim that was being made, what I'm saying 4 is, the notice that would be required is a notice 5 within 180 days of the date that they begin 6 providing additional services. That's the basis 7 for their claim: We provided additional services 8 under the contract. We're entitled to be paid 9 whether you call it an equitable adjustment or 10 whether you call it what they're calling it, which 11 is 4.7 percent of the increase in cost. 12 Either one of those things was known by 13 Petra well in advance of February of 2009 either 14 by way of this section of the agreement or by way 15 of the contention that they have continually made 16 to this court that we're entitled to an increase 17 in our fee based on 4.7 percent of the actual 18 construction cost. 19 So the question then becomes: Did they 20 wait until February of 2009 to begin providing the 21 additional service? I don't think so. Exhibit 2, 22 which is the claim, notice of claim, and the 23 document that they submit to the city saying, 24 "This is why you should pay us more money," starts 25 accumulating their time for, quote/unquote,</p> <p style="text-align: right;">Page 21</p>	<p>1 contract. They knew they were providing 2 additional services. And therefore, there's no 3 basis to argue that the date moves forward to 4 2009, some seven months after -- seven months, 5 Judge, after October 15, 2008 when they say the 6 project was complete. 7 It defies credibility for Petra to 8 argue that they had no knowledge until seven 9 months after. 10 THE COURT: Mr. Trout, do me a favor and 11 leave that up, will you? I want to hear from 12 Mr. Walker on this issue, if you don't mind. 13 MR. TROUT: I will. Happy to leave that up. 14 I think the next thing for the court to 15 recognize is that what they're suggesting to the 16 court in very plain language is that the, 17 quote/unquote, four items, custom and practice, 18 course of dealing, section 8.1, all constitute 19 what are called waivers, all waivers. 20 And the language that I would like the 21 court to focus on is specifically in our 22 memorandum, and it consists of two items. Number 23 1 -- and of course, the passage of time, which is 24 I think the big point that counsel wanted to make. 25 And all you have to do to answer that question to</p> <p style="text-align: right;">Page 23</p>
<p>1 additional services on July 31 of 2007 in the form 2 of 3.5 hours charged to Wes Bettis, the project 3 manager. 4 Now, when should a reasonably prudent 5 construction manager, charged with a fiduciary 6 duty to this city, be on notice of facts giving 7 rise to the claim? Well, when they begin 8 providing the additional service if section 7 is 9 the basis upon which they want to do it or when 10 they know of an increase in cost, which was 11 January 15 of 2007. Neither of those dates is in 12 February of 2009. Can't get there from here. The 13 facts don't support their position. 14 And so whether you call this some kind 15 of equitable claim, which still seeks money 16 damages, or whether you call it a breach of 17 contract claim, which still seeks money damages, 18 the fundamental question is, if you're going to 19 seek money from the city, you go back to the city 20 of Ammon case and say, "When does a reasonably 21 prudent person in their position have notice of 22 facts which would give rise to the claim?" 23 Those are the two dates, January 15 or 24 the day they began providing additional services, 25 even though they didn't meet that condition of the</p> <p style="text-align: right;">Page 22</p>	<p>1 your satisfaction is look to how the Supreme Court 2 of Idaho answered that question to its 3 satisfaction in the Udell decision. 4 They said: "In our view, the sovereign 5 immunity protected by the act, speaking of the 6 Tort Claims Act, should not be dissipated by 7 ad hoc waivers." 8 Now, each of the items, that each of 9 those four items are specifically ad hoc waivers 10 that Petra would like the court to adopt as 11 exceptions to the rule. And that's clearly not 12 the case in Idaho, and it clearly can't be the 13 case in Idaho. It is answered by the Udell 14 decision. It's also answered in another way by 15 another decision of the state. Kelso Irwin, PA 16 versus the State Insurance Fund, 134 Idaho 130, in 17 which the court, Supreme Court, uniformly stated: 18 "It has been long recognized that the general rule 19 is that equitable estoppel may not be invoked 20 against a government or public agency functioning 21 in the governmental capacity." 22 There's absolutely no doubt, none, that 23 the provision of notice under 5219 and the Idaho 24 Tort Claims Act to -- not the city attorney, not 25 me, not anybody except the city clerk who is</p> <p style="text-align: right;">Page 24</p>

<p>1 charged as the recipient of the appropriate notice 2 can be anything other than compliance with the 3 act.</p> <p>4 There is no substantial compliance, and 5 no case cited by Petra that says substantial 6 compliance means I can talk to the city attorney 7 in a meeting. I can talk to Mr. Trout who is 8 representing them. I can send a letter to the 9 city attorney.</p> <p>10 You won't find a single case in Idaho 11 that says anything other than an appropriate 12 notice sent to the clerk of the municipal entity 13 within 180 days of the date the claim was made 14 aware of by the claimant is anything but 15 compliant.</p> <p>16 And under that set of circumstances, 17 all four of the items cited by Petra as excuses, 18 custom and trade, which is, by the way, a legal 19 opinion by Mr. Bauer and not one that is subject 20 to the court's deference, some kind of notice 21 under section 8.1 which specifically says, it 22 doesn't define claim as just a claim for money 23 damages. It says, "or other matter in question 24 arising out of or related to this agreement." And 25 then it says not "and," but it says, "or the</p> <p style="text-align: right;">Page 25</p>	<p>1 provision anywhere and no case law cited by Petra 2 anywhere, nor any facts submitted in this case 3 that one could conclude that the city was acting 4 in some kind of wrongful or deceitful way and 5 didn't act at all. The bottom line is, it's not a 6 notice requirement on behalf of the city.</p> <p>7 It's a notice requirement on behalf of 8 the claimant. And whether the claimant complies 9 or not, the case law is very clear in our state, 10 is that it's absolutely jurisdictional in order 11 for that determination to be made.</p> <p>12 And I'll quote specifically, Judge, 13 from the case of Udell. It says, "The 14 jurisdictional significance of the prerequisite 15 notice of the Idaho Tort Claims Act."</p> <p>16 It doesn't allow for anything other 17 than notice by the claimant. And therefore, 18 assuming that we had all of those other facts that 19 you suggested, Judge, there might be some case law 20 somewhere that says a wrongful inducement not to 21 file the notice of claim might be appropriate.</p> <p>22 Well, we don't have that case here, and 23 we don't have that case law here. What we have is 24 a flat failure to comply, and it's got to be based 25 on one of two things: It's got to be based on</p> <p style="text-align: right;">Page 27</p>
<p>1 breach hereof."</p> <p>2 Under that set of circumstances and the 3 contractual definition of claim, was this a matter 4 in question? Well, it's a matter in question if 5 prior to providing any additional service the 6 construction manager shall notify of the proposed 7 change. And under section 8.1, which I'll point 8 out to the court, it isn't 180 days, Judge. It's 9 the 21.</p> <p>10 THE COURT: Well, let me ask you this. 11 Given the provision in the contract that requires 12 any dispute over any claim to be submitted for 13 discussion -- right? -- it seems to me that that 14 might allow the city to continue with the 15 discussion of this claim and this dispute for a 16 lengthy period of time, perhaps for 181 days, and 17 then say, "Discussion is over, we're not paying." 18 And then come back and say, "Sorry. 19 You didn't comply with the Tort Claim Act. You 20 can't sue us either."</p> <p>21 MR. TROUT: There's no provision in the 22 statute that talks about, quote/unquote, wrongful 23 inducement by the city. There's no provision in 24 the case law that talks about some kind of 25 wrongful inducement by any city. There's no</p> <p style="text-align: right;">Page 26</p>	<p>1 January 15 of 2007 or it's got to be based upon 2 the date they started providing the additional 3 services and the notice was required to the owner 4 then.</p> <p>5 One last item.</p> <p>6 THE COURT: Go ahead, and then I'll have one 7 question.</p> <p>8 MR. TROUT: The last item is this. It 9 addresses the point that was being made about the 10 passage of time. And I'll give you two pieces, 11 Judge. The first is, the Udell case specifically 12 deals with the passage of time: "If the state is 13 immune from liability because of a failure of the 14 claimant to comply with the notice requirements of 15 the Tort Claims Act, the immunity may be raised at 16 any time."</p> <p>17 No question about that. That's a 18 specific finding.</p> <p>19 THE COURT: Because it is jurisdictional.</p> <p>20 MR. TROUT: That's because it's 21 jurisdictional. And secondarily, I would ask the 22 court to turn its attention, because I thought 23 Petra might raise this issue to a case called 24 Trees, just like the ones that stand with leaves, 25 versus Kersey, which is at 56 P.2d Third 765. It</p> <p style="text-align: right;">Page 28</p>

<p>1 is a 2002 decision of the Supreme Court.</p> <p>2 And what is important about the Kersey</p> <p>3 case is, claims like contract claims that might be</p> <p>4 illegal or claims that fail under the Tort Claims</p> <p>5 Act can be raised at any time, and in fact, "The</p> <p>6 court has a duty to raise the issue of illegality</p> <p>7 sua sponte."</p> <p>8 And so for Petra to argue that there's</p> <p>9 any kind of waiver, that there's any kind of,</p> <p>10 quote/unquote, equitable right that is not being</p> <p>11 adjusted here does not resolve the question of</p> <p>12 illegality.</p> <p>13 THE COURT: And the question I had for you,</p> <p>14 Mr. Trout, was, I usually see the defense of</p> <p>15 failure to comply with the Tort Claim Act, the</p> <p>16 notice requirement of the Tort Claim Act, in a</p> <p>17 pure tort setting. And here it appears that the</p> <p>18 allegation here is sounding in breach of contract</p> <p>19 as opposed to tort.</p> <p>20 And you look at the language of the</p> <p>21 Tort Claim Act itself which talks about, hey, any</p> <p>22 claim, we're not talking just about tort claims.</p> <p>23 We're talking about breach of contract, failure to</p> <p>24 pay a bill is, even though that's a contract-based</p> <p>25 cause action, it doesn't make any difference. Any</p> <p style="text-align: right;">Page 29</p>	<p>1 Those cases in which they directly</p> <p>2 address the question of whether all means all have</p> <p>3 uniformly said it does in fact all means all.</p> <p>4 Whether contract-based, tort-based, equitable, or</p> <p>5 otherwise, the statute has the fundamental purpose</p> <p>6 as stated in Pounds, you must give the notice once</p> <p>7 you're aware of any fact that gives rise to the</p> <p>8 claim.</p> <p>9 THE COURT: And finally, with respect to</p> <p>10 Mr. Walker's citation to the Oregon case law which</p> <p>11 he contends is persuasive and the State of Idaho</p> <p>12 would likely follow the same reasoning, are you</p> <p>13 prepared to address that with respect to these</p> <p>14 mandatory counterclaims?</p> <p>15 MR. TROUT: The Oregon case and the Oregon</p> <p>16 case law takes deference to the federal statute.</p> <p>17 THE COURT: Where Idaho does not.</p> <p>18 MR. TROUT: And Idaho does not. The Knudsen</p> <p>19 decision specifically says Idaho won't give</p> <p>20 deference to the federal statute for the reason</p> <p>21 that the Idaho legislature is presumed to know of</p> <p>22 which it speaks, makes the law which it intends.</p> <p>23 THE COURT: Okay. Thank you. Appreciate</p> <p>24 it.</p> <p>25 Mr. Walker, I wanted to give you</p> <p style="text-align: right;">Page 31</p>
<p>1 demand for money that you claim that you're owed</p> <p>2 has to comply with the Tort Claim Act.</p> <p>3 MR. TROUT: That's correct. And the other</p> <p>4 jurisdictions that have looked at that issue or</p> <p>5 are uniformly of the same notion, and in fact</p> <p>6 we've cited three different cases to the court:</p> <p>7 City of Racine versus Waste Facility Siting Board,</p> <p>8 a Wisconsin decision. "Notice of claim is a</p> <p>9 necessary prerequisite to all actions, all</p> <p>10 actions, brought against the entity as listed in</p> <p>11 the statute, including governmental subdivision,</p> <p>12 whether tort or nontort, whether brought as an</p> <p>13 initial claim, counterclaim, or a cross claim."</p> <p>14 Nassau County versus Wolfo. The fact</p> <p>15 that it was the county which first initiated this</p> <p>16 litigation does not relieve the defendant from</p> <p>17 complying with the notice of claim provisions</p> <p>18 where the defendant seeks affirmative relief by</p> <p>19 way of a counterclaim.</p> <p>20 Department of Transportation versus</p> <p>21 PSC Resources. "Joining those other jurisdictions</p> <p>22 which have barred the assertion of counterclaims</p> <p>23 where the defendant has not previously complied</p> <p>24 with a notice of claim provision of municipal</p> <p>25 ordinances."</p> <p style="text-align: right;">Page 30</p>	<p>1 another opportunity to respond, because Mr. Trout</p> <p>2 has been kind enough to put on the big screen here</p> <p>3 in the courtroom page 16 of the contract and the</p> <p>4 part that he has highlighted which reads: "Prior</p> <p>5 to providing any additional services, the</p> <p>6 construction manager, Petra in this case, shall</p> <p>7 notify the owner or the city of the proposed</p> <p>8 change in services and receive owner's approval</p> <p>9 for the change."</p> <p>10 How would you respond to that? Failure</p> <p>11 of condition precedent.</p> <p>12 MR. WALKER: Contrary to Mr. Trout's</p> <p>13 representation, there are affidavit testimony that</p> <p>14 we have submitted in support of our various</p> <p>15 motions which indicate that the notice was</p> <p>16 provided to the city prior to rendering any</p> <p>17 additional services. The court can review those</p> <p>18 affidavits. And so the condition precedent was</p> <p>19 met.</p> <p>20 And in addition, it's important to</p> <p>21 point out and we point this out in our briefing is</p> <p>22 that paragraph 7 does not include the requirement</p> <p>23 that the notice be in writing, and that was</p> <p>24 intentional, and the argument is in our briefing</p> <p>25 with regard to that.</p> <p style="text-align: right;">Page 32</p>

<p>1 And the reason for that, Your Honor, is  2 that this was a complex project where literally  3 many, many decisions, maybe as many 50 or 100  4 decisions were made on a daily basis, including  5 changes in Petra's responsibility as a  6 construction manager.  7 So specifically, because it would have  8 been impossible to build the building, if we had  9 to give written notice every time there was going  10 to be some additional service, the project would  11 have never been built.  12 Secondly, with regard to either a  13 change order is a claim or it's not. The city  14 can't have it both ways. Well, regardless of what  15 date we use, if you use July 30, 2007 as the date  16 when Petra should have -- we don't agree with  17 that but should have become aware -- Petra filed  18 its official notice on November 5, 2007, which is  19 within 180 days of July 30, '07.  20 And in addition, if November 5, 2007 is  21 the operative date, Petra filed its change order  22 number 2 on April 8, 2008, which is five months  23 down the road, less than 180 days, Your Honor.  24 So irrespective of what the city's  25 position is with regard to the start date, we</p> <p style="text-align: right;">Page 33</p>	<p>1 and all of the communications from and after  2 March 16, 2009 were sent through Mr. Trout.  3 With regard to the wrongful act as  4 defined in the statute, our position, and we've  5 briefed this, Your Honor, is that the city  6 breached the construction management agreement  7 when it denied change order number 2, in which it  8 didn't deny part of it. It just says, "We're not  9 going to pay you, irrespective of the additional  10 services that you have rendered."  11 Thank you, Your Honor.  12 THE COURT: Thank you.  13 MR. WALKER: Do you want to hear on these  14 other two motions in limine that Petra has filed?  15 THE COURT: Hang on just a second.  16 Mr. Trout?  17 MR. TROUT: Well, one last point.  18 THE COURT: And I'm going to give you the  19 final word, because I think it's fair enough,  20 Mr. Trout, that it's your motion, and I think it's  21 only fair that the person who brings the motion  22 gets the final word.  23 I asked Mr. Walker to address something  24 that I thought was appropriate to address, so I  25 want to give you the final word. If you have</p> <p style="text-align: right;">Page 35</p>
<p>1 think that it's clear that the start date is  2 February 24. And our argument with respect to the  3 definition of claim is not a waiver argument.  4 It's a definitional argument. The claim is  5 defined in the construction management agreement.  6 It's defined in the custom and practice of the  7 industry. It is defined in the statute which is  8 important, and it is defined by the party's course  9 of dealing.  10 With regard to providing service to the  11 city clerk, the court will review the cases that  12 we cited in our brief. For example, the Cox  13 versus Sandpoint, the notice was substantively met  14 by letters to the city, just addressed to the  15 city, and billings to the city.  16 And in this case, it's peculiar because  17 my folks, the Petra representatives, in particular  18 Gene Bennett, and I believe this is in one of his  19 affidavits, attempted to contact and discuss this  20 matter with Keith Watts after Mr. Trout was  21 engaged. And I received an email from Mr. Trout  22 instructing that all communications should go  23 through Mr. Trout and not directly to the city.  24 And so we followed that rule which was  25 reasonable, I suppose, under the circumstances,</p> <p style="text-align: right;">Page 34</p>	<p>1 rebuttal with respect to that last argument that  2 Mr. Walker made.  3 MR. TROUT: I do. I've now heard it not  4 less than four times in the hearings in this case,  5 and I think it's time we put to bed what the real  6 answer to the question is. I keep hearing that  7 it's not a waiver argument, but in fact it has to  8 act as a waiver. Otherwise, there can't be  9 compliance because the notice was never served on  10 the city clerk as required by law.  11 And specifically section 10.17 says:  12 "This is the entire agreement between the parties  13 with respect to the matters covered herein,  14 supersedes all prior written and oral. Any  15 waivers hereunder must be in writing."  16 All of this discussion about affidavits  17 saying, "We changed this, we changed that, we  18 changed our duties under the contract," none are  19 in writing, and there's no waiver of the Idaho  20 Tort Claims Act and its requirements in writing.  21 Thank you, Judge.  22 THE COURT: Thank you. Hang on just a  23 second.  24 I have a question, Mr. Walker. The  25 March 16, 2009 demand --</p> <p style="text-align: right;">Page 36</p>

<p>1 MR. WALKER: Yes, Your Honor.</p> <p>2 THE COURT: -- that you made. To whom was</p> <p>3 that directed precisely?</p> <p>4 MR. WALKER: William Nary, the city</p> <p>5 attorney. At the time I knew that the city was</p> <p>6 represented by the city attorney. And under the</p> <p>7 professional code of professional responsibility,</p> <p>8 I sent a letter to the city attorney, and we've</p> <p>9 cited that in our brief, Your Honor.</p> <p>10 THE COURT: Thank you.</p> <p>11 Here is my ruling on this motion to</p> <p>12 dismiss the Petra counterclaims against the City</p> <p>13 of Meridian, based on the contention that the</p> <p>14 claimant Petra failed to comply with the notice</p> <p>15 requirement of the Idaho Tort Claim Act.</p> <p>16 I'm going to deny the motion based on</p> <p>17 this analysis. The cause of action didn't accrue</p> <p>18 fully until February 24, 2009 when the claim was</p> <p>19 denied. That is when Petra was reasonably put on</p> <p>20 notice that it had a claim.</p> <p>21 Although the act specifies that notice</p> <p>22 under the Tort Claim Act has to be given to the</p> <p>23 secretary or the clerk of the agency involved in</p> <p>24 this case, the entity, the city, was represented</p> <p>25 by counsel, and notice was given to the city</p> <p style="text-align: right;">Page 37</p>	<p>1 Right?</p> <p>2 MR. WALKER: Correct, Your Honor.</p> <p>3 THE COURT: And since then -- and they were</p> <p>4 relied on for their -- they were admitted by the</p> <p>5 court and relied upon by the court based on the</p> <p>6 fact that they were admissible lay opinions as</p> <p>7 opposed to expert opinions.</p> <p>8 Since that time, it appears to the</p> <p>9 court that the Defendant/Counterclaim Petra has</p> <p>10 identified those witnesses as experts and that you</p> <p>11 did that for trial and that you did that timely.</p> <p>12 My understanding of the second motion</p> <p>13 in limine filed by Meridian now is that the city</p> <p>14 seeks to exclude those three affidavits and one</p> <p>15 other affidavit based on the -- well, based on</p> <p>16 the -- well, based on an additional argument.</p> <p>17 So I do think that that's properly</p> <p>18 before the court today, and I'm going to give</p> <p>19 Mr. Trout an opportunity to argue in favor of his</p> <p>20 motion in limine with respect to those three</p> <p>21 witnesses, plus that fourth witness, plus Lemley's</p> <p>22 affidavit. Okay?</p> <p>23 MR. WALKER: That's fine, Your Honor.</p> <p>24 THE COURT: But in the meantime, I'll hear</p> <p>25 your argument on your two motions in limine.</p> <p style="text-align: right;">Page 39</p>
<p>1 through their attorney of record on March 16,</p> <p>2 2009.</p> <p>3 I find that the provisions of the</p> <p>4 Tort Claim Act do cover all of the counterclaims,</p> <p>5 including the contract claims. Notice was</p> <p>6 complied with on March 16, 2009. Therefore, the</p> <p>7 motion to dismiss on the grounds stated is denied.</p> <p>8 And at this point, I'm ready to hear</p> <p>9 the arguments on the two motions in limine, two</p> <p>10 motions filed by each side.</p> <p>11 MR. WALKER: I don't think the city has</p> <p>12 filed any motions in limine.</p> <p>13 MR. TROUT: Yes, we did.</p> <p>14 THE COURT: Yeah. The city --</p> <p>15 MR. WALKER: We didn't get them if they were</p> <p>16 filed.</p> <p>17 THE COURT: The Lemley affidavit, right?</p> <p>18 MR. WALKER: I thought those were motions to</p> <p>19 strike that the court has already ruled on.</p> <p>20 MR. TROUT: No. They were motions in limine</p> <p>21 with respect to --</p> <p>22 THE COURT: I'm going to hear those as well.</p> <p>23 Particularly the Bennett, Coughlin, and Frank</p> <p>24 affidavits were submitted in connection with the</p> <p>25 motion for summary judgment that I ruled upon.</p> <p style="text-align: right;">Page 38</p>	<p>1 MR. WALKER: Okay, Your Honor. Thank you.</p> <p>2 I'll go ahead and start with the motion in limine</p> <p>3 to exclude evidence of the city's damages.</p> <p>4 As the court knows from our prior</p> <p>5 argument to date, the city filed its complaint on</p> <p>6 April 16, 2009. And in its complaint, it seeks</p> <p>7 damages for Petra's breach of contract.</p> <p>8 Now we're just 65 days before trial, 17</p> <p>9 months after the complaint was filed, and Meridian</p> <p>10 has not disclosed the critical factual information</p> <p>11 regarding its damages that Petra needs to defend</p> <p>12 against those claims.</p> <p>13 And this is despite Petra's expansive</p> <p>14 discovery efforts, which included taking the</p> <p>15 depositions of Mayor Tammy de Weerd, the counsel</p> <p>16 president Charlie Roundtree, the city council</p> <p>17 liaison Keith Bird, Keith Watts, the city's</p> <p>18 authorized representative under the construction</p> <p>19 management agreement and the city's purchasing</p> <p>20 agent. Your Honor, we also deposed three of the</p> <p>21 city's experts: Steven Amento, Laura Knothe, and</p> <p>22 Todd Weltner.</p> <p>23 Now, importantly, the city has not</p> <p>24 disclosed any experts who may testify regarding</p> <p>25 damages, and none of the deponents that we took</p> <p style="text-align: right;">Page 40</p>



<p>1 depositions of identify the city's damages 2 theories or amounts.</p> <p>3 And as the court knows, in order to 4 defend against any damage claim, the defendant and 5 in this case Petra needs to know first each 6 element of alleged damage; second, the amount of 7 the alleged damage arising with respect to each 8 such element; third, the method of calculating the 9 amount of the alleged damage with respect to each 10 element; fourth, the assumptions underlying the 11 calculation of the amount of the alleged damage 12 arising with respect to each element; and fifth 13 and importantly, the cause or the cause of the 14 alleged damage.</p> <p>15 Now, the city's opposition brief 16 states, and I quote: "Petra simply cannot in 17 good-faith assert that it did not receive the 18 disclosure of Meridian's evidence of damages." 19 However, consistent with the strategy so far 20 during discovery, the city's responsive brief 21 doesn't cite a single reference to the record 22 where either the court or Petra can find the 23 theories, the amounts, how the amounts of damage 24 were calculated.</p> <p>25 And the reason for that, Your Honor, is</p> <p style="text-align: right;">Page 41</p>	<p>1 claims. And the city's response was: "The body 2 of law comprising contract law as applicable to 3 the facts and the law of torts, applicable to the 4 facts supports the claims and defenses made by 5 Meridian in this matter. The body of law 6 comprising equitable principles supports the 7 claims of defenses of Meridian in this matter."</p> <p>8 THE COURT: So in short you're saying, you 9 were asking how much, and they were saying we 10 don't know yet.</p> <p>11 MR. WALKER: And each and every one of their 12 witnesses did not know. And specifically, the 13 three experts said that they had never been 14 asked -- excuse me, the two experts, Amento and 15 Knothe, said they had never been asked to make a 16 damages calculation.</p> <p>17 THE COURT: Now, this motion which you're 18 couching in terms of a motion in limine is the 19 whole ball game as far as their claim is 20 concerned. You would agree with that, wouldn't 21 you?</p> <p>22 MR. WALKER: Yes. On damages, correct.</p> <p>23 THE COURT: In other words, if this court 24 grants your motion in limine and based upon your 25 contention that Meridian failed to comply with</p> <p style="text-align: right;">Page 43</p>
<p>1 that there is no evidence in the record.</p> <p>2 THE COURT: Well, precisely what were their 3 responses to those questions when you made 4 requests for admission or -- well, I suppose when 5 you made your interrogatory, when you asked your 6 question by way of interrogatory and you at some 7 point said, "How much do you claim we owe you and 8 how did you calculate that, and what's your theory 9 here?"</p> <p>10 And your contention is that there was 11 never a response that would allow you to know 12 enough about their claims, their claim or claims, 13 that you could give to your expert to be ready to 14 refute that.</p> <p>15 MR. WALKER: Let me give you the answers.</p> <p>16 We asked them to identify their damage 17 claim. The city responded in their response to 18 our interrogatory: "At present the findings to 19 date indicate that Petra's conduct, both its 20 actions and it's failures to act are the cause of 21 substantial but yet to be quantified damages to 22 the City of Meridian under the legal theories 23 expressed in the complaint."</p> <p>24 We asked another interrogatory 25 regarding legal and factual bases for the city's</p> <p style="text-align: right;">Page 42</p>	<p>1 your reasonable discovery request by ever saying 2 how much they wanted and specifically factually 3 that was based on, that they should be precluded 4 now from putting on any evidence that would 5 support any specific claim for damages.</p> <p>6 And without a specific claim for 7 damages, there's no way that you could be prepared 8 to meet that?</p> <p>9 MR. WALKER: That's correct, Your Honor, 10 because we would have to have expert testimony. 11 The deadline for our disclosure of experts has 12 past. And in any event, we're just literally 60 13 days before trial, and we don't know what we did 14 wrong or if we did anything wrong; what damage did 15 it cause and in what amount and how did they 16 calculate it. We don't have the answers to any of 17 those questions.</p> <p>18 Briefly then, Your Honor, I'll move on 19 to the experts, and this is again a question of 20 nondisclosure on the part of the City of Meridian.</p> <p>21 As the court knows, its scheduling 22 order required the city to disclose its experts on 23 or before July 28, 2010. It says the disclosure 24 be made in compliance with Rule 26(b)(4), and the 25 court is aware of the standards under 26 (b)(4).</p> <p style="text-align: right;">Page 44</p>

<p>1 THE COURT: Now, you concede that out of the 2 12 experts, three of them complied. 3 MR. WALKER: Essentially. Not completely 4 but essentially. 5 THE COURT: But there's nine others that you 6 want me to say -- 7 MR. WALKER: They're out. And because we 8 don't -- we didn't have any information except on 9 July 28 we received by fax a list of 12 names. 10 And recently they supplemented their discovery 11 responses. However, the supplements did not meet 12 the requirements of either Rule 26(b)(4) or 13 respond to our interrogatory with regard to expert 14 witness disclosures. 15 And specifically I've cited in our 16 briefing our interrogatory dealing with the 17 request of disclosure as to expert witnesses, and 18 it's very precise. It asks for some additional 19 information in addition to 26(b)(4). And as we've 20 cited in our briefing, the Idaho Supreme Court in 21 Schmechel versus Dille has held that Rule 26(e) 22 unambiguously imposes a continuing duty to 23 supplement responses to discovery with respect to 24 the substance and subject matter of the expert's 25 testimony where initial responses have been</p> <p style="text-align: right;">Page 45</p>	<p>1 making the disclosure in an effort to secure the 2 disclosure without court action." 3 Petra wants to bypass the meet and 4 confer requirement entirely and ask the court to 5 enter an order without having complied with 6 37(a)(2), and on that basis alone, Judge, you are 7 free and in fact should deny the motion. 8 Secondly, if I might, if I might 9 approach, Judge. 10 THE COURT: All right. 11 MR. TROUT: I'm handing you what is a copy 12 of the May 6 Petra Incorporated first request for 13 discovery. And I'm going to ask the court to 14 direct its attention to the instructions submitted 15 by Petra with respect to that request, and that 16 is, "Including supplementing answers and responses 17 from time to time but not later than 30 days after 18 receipt of the additional information or documents 19 and in no event later than 45 days before trial." 20 Petra's motion today is premature, and 21 I'll represent to the court that each of the 22 parties that we have listed, including the 23 affidavits, were all supplemented within 30 days 24 of our obtaining the information. 25 And finally I'll conclude. To say that</p> <p style="text-align: right;">Page 47</p>
<p>1 rejected, modified, expanded, or otherwise altered 2 in some state. 3 And at this late date, Your Honor, it's 4 simply unreasonable to assume that we can properly 5 prepare, number one, to take the deposition of 6 these nine experts and certainly to prepare cross 7 examination for trial. 8 Thank you, Your Honor. 9 THE COURT: Thank you, counsel. 10 And I'll hear your opposition argument 11 to the two motions in limine filed by Petra, 12 Mr. Trout. 13 MR. TROUT: Thank you, Judge. 14 This is nothing more than a disguised 15 effort on Petra to fail to comply with the Idaho 16 Idaho Rules of Civil Procedure. Judge, you're 17 aware that any requests under Rule 37(a) has to be 18 met with a certification by counsel to meet and 19 confer. 20 There's no affidavit. There's no 21 document. There's no letter. There's no effort 22 with respect to meet and confer as required under 23 37(a)(2): "The motion must include a 24 certification that the movant has in good-faith 25 conferred or attempted to confer with a party not</p> <p style="text-align: right;">Page 46</p>	<p>1 Petra is not prepared to depose these people is 2 unequivocally wrong. If I might approach? 3 This is a deposition schedule, which 4 I'm handing to the court, copy to counsel, in 5 which every single one of these people have been 6 discussed, and we have agreed to dates for 7 deposition for every single one of these 8 individuals, including Mr. Geiss, Mr. Cotton, 9 Mr. Neidigh, Mr. Wetherholt, Mr. Anderson. A 10 continued deposition of Laura Knothe who has been 11 deposed once but whose deposition wasn't 12 completed. Mike Simmonds, Tim Petsche, 13 Todd Weltner, which is a continuation of his 14 deposition which was taken once but not completed. 15 Steve Amento whose deposition has been taken but 16 not yet completed. Ted Baird whose deposition has 17 been taken but not yet completed. 18 And so every one of the people that 19 we've identified is currently subject to a 20 discovery date and deposition agreed to between 21 counsel with respect to the information that they 22 have in this matter. 23 THE COURT: How many days before trial are 24 we today? 25 MR. TROUT: Judge, I haven't done the</p> <p style="text-align: right;">Page 48</p>

<p>1 calculation.</p> <p>2 THE COURT: December 1. 65? Okay.</p> <p>3 MR. WALKER: 65.</p> <p>4 MR. TROUT: Correct. So according to the</p> <p>5 request made by Petra, the requests made in this</p> <p>6 motion is, A, premature; and B, barred by failure</p> <p>7 to provide a certification to the court as</p> <p>8 required under Rule 37.</p> <p>9 One last item, Judge. I won't stand</p> <p>10 here and tell you that I have every single</p> <p>11 citation to every piece of the transcript. But in</p> <p>12 the depositions of Mr. Baird, Mr. Watts,</p> <p>13 Mr. Amento, Ms. Knothe, and Mr. Weltner, and the</p> <p>14 affidavits that were submitted in opposition to</p> <p>15 Petra's motion for summary judgment, all of the</p> <p>16 foundational bases for the city's claim of damages</p> <p>17 have been stated.</p> <p>18 THE COURT: Let me ask you this question,</p> <p>19 and this is something that I intended to ask when</p> <p>20 we got to this point in the arguments today.</p> <p>21 If I were to ask you today, Mr. Trout,</p> <p>22 if you could tell the court today -- and I'm not</p> <p>23 asking if you can say what the city would settle</p> <p>24 for or something like that. But do you have a</p> <p>25 precise figure on how much money you claim that</p> <p style="text-align: right;">Page 49</p>	<p>1 September 15. And Exhibit O to that affidavit is</p> <p>2 a letter that I wrote to Mr. Trout, a detailed</p> <p>3 letter pointing out the deficient answers. It is</p> <p>4 dated June 12, 2009, more than a year ago.</p> <p>5 The response I received to that was on</p> <p>6 June 16, 2009 from Mr. Trout's assistant,</p> <p>7 Kevin Kluckhorn. And Kevin writes: "Tom, Kim</p> <p>8 forwarded your June 12, 2009 letter to me</p> <p>9 regarding the discovery responses. We are</p> <p>10 currently preparing for a trial set to begin on</p> <p>11 Monday, June 22, 2009, and lasts five to ten days.</p> <p>12 "We will be unavailable to meet and</p> <p>13 confer by that deadline you requested, and we will</p> <p>14 respond just as soon as you're able to meet after</p> <p>15 that trial."</p> <p>16 Never heard another word from them.</p> <p>17 But as we argue in our brief, our motion in limine</p> <p>18 is not a motion to compel.</p> <p>19 THE COURT: Right, and I understand that.</p> <p>20 MR. WALKER: And with regard to the depo</p> <p>21 notices, the court's scheduling order says that</p> <p>22 all depositions shall be noticed up before</p> <p>23 September 29. So out of -- as a protective</p> <p>24 measure, we went ahead and obtained available</p> <p>25 dates so we could take the depositions of these</p> <p style="text-align: right;">Page 51</p>
<p>1 the city is entitled to?</p> <p>2 MR. TROUT: I have one precise figure, and I</p> <p>3 have some estimates. The one precise figure is</p> <p>4 with respect to Petra's failure to collect</p> <p>5 liquidated damages, and it approximates</p> <p>6 \$1.2 million.</p> <p>7 And there are additional damages being</p> <p>8 calculated as we sit here in order to comply with</p> <p>9 the discovery request and the deadlines set. I</p> <p>10 will tell you that we have had continuing</p> <p>11 discussions about the 30(b)(6) deponent that Petra</p> <p>12 has requested of us for a damages calculation, and</p> <p>13 we're going to name at least two individuals as</p> <p>14 the 30(b)(6) representatives to be deposed.</p> <p>15 They're included in this list of deponents.</p> <p>16 And so that discovery is underway as</p> <p>17 well, in compliance with the timeframes set forth</p> <p>18 in Petra's discovery response.</p> <p>19 THE COURT: All right. I guess that's all.</p> <p>20 MR. TROUT: Thank you, sir.</p> <p>21 THE COURT: Go ahead, counsel.</p> <p>22 MR. WALKER: Thank you, Your Honor. With</p> <p>23 regard to the no effort to meet and confer, I</p> <p>24 filed an affidavit in opposition to the motion to</p> <p>25 dismiss under the Tort Claims Act. It's dated</p> <p style="text-align: right;">Page 50</p>	<p>1 other nine experts.</p> <p>2 But right now we have to go into those</p> <p>3 depositions essentially blind. We're not sure</p> <p>4 what they're going to testify about. However, if</p> <p>5 they had responded to our interrogatory number 16</p> <p>6 and had complied with Rule 26(b)(4), we would be</p> <p>7 able to prepare to take those depositions.</p> <p>8 Mr. Trout also mentioned that on this</p> <p>9 list, that there are damages experts. I don't see</p> <p>10 them, Your Honor, but I certainly would be</p> <p>11 interested to know who they are. Thank you.</p> <p>12 THE COURT: All right. Let me tell you what</p> <p>13 I'm going to do on these two motions in limine</p> <p>14 filed by Petra.</p> <p>15 The first request for discovery that</p> <p>16 was served by Petra on Meridian on or about I</p> <p>17 believe May 7, 2009, actually dated May 6, 2009,</p> <p>18 requests these answers in any event no later than</p> <p>19 45 days before trial.</p> <p>20 I'm not going to grant the motion to</p> <p>21 exclude testimony by the nine experts until and</p> <p>22 unless 45 days before trial the expert opinions</p> <p>23 are not received. It could be that perhaps the</p> <p>24 26(b)(4) disclosures for one or two of the</p> <p>25 witnesses will be served in response to this</p> <p style="text-align: right;">Page 52</p>

1 discovery request 45 days before trial, and others  
2 won't be disclosed by then.

3 To the extent that any of these named  
4 experts fail to have their opinions and the basis  
5 of their opinions, and so forth, by 45 days before  
6 trial, they'll be excluded. But I'm going to give  
7 Meridian until 45 days before trial to comply with  
8 the discovery request, which does contain the  
9 demand to have these opinions disclosed in any  
10 event no later than 45 days before trial.

11 There is no requirement on a motion in  
12 limine to exclude evidence to show that one of the  
13 parties brought a motion to compel anyway. And in  
14 any event, this isn't a motion to compel. And the  
15 meet and confer provision of Rule 37 of the Idaho  
16 Rules of Civil Procedure does not apply otherwise  
17 in motions to compel.

18 On the other hand, I will order the  
19 parties to meet and confer about two issues. One,  
20 and most importantly, the testimony that has been  
21 sought or rather the answers to interrogatories,  
22 and so forth, that have been aimed at obtaining  
23 information from the City of Meridian to support  
24 their claim for damages, and to do that within  
25 absolutely no later than 30 days before trial, to

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1 for hearing today, Mr. Walker, I'm going to direct  
2 you to prepare an order consistent with the  
3 court's pronouncements from the bench today with  
4 respect to the motion to dismiss. Petra prevailed  
5 on that issue.

6 And, Mr. Trout, with respect to this --  
7 your opposition to Petra's motions in limine, you  
8 prevailed on both of those motions in limine, so  
9 you prepare an order for the court's signature.  
10 And keep these quite cryptic, folks. I don't  
11 think I need to do findings of fact and  
12 conclusions of law, and I don't want to have a  
13 fight about the -- I think that the important part  
14 of these rulings is the bottom line ruling  
15 themselves, the denial of the motions on both  
16 sides rather than trying to incorporate into the  
17 court's rulings anything that I didn't  
18 specifically mention here on the bench today.

19 The final thing that we have to do  
20 today is address the motions in limine filed by  
21 you, Mr. Trout. You had two things?

22 MR. TROUT: I do.

23 THE COURT: The Lemley affidavit, is that  
24 right?

25 MR. TROUT: Yes, Your Honor.

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1 meet and confer about that.

2 Now, I could order I suppose mediation.  
3 But under the circumstances of the case, I'm not  
4 going to do that right now. I can't remember if  
5 the parties have mediated this or not.

6 MR. TROUT: We did.

7 THE COURT: Okay. Secondly -- and I'm not  
8 going to grant the motion. I'm going to deny the  
9 motion in limine that will preclude the City of  
10 Meridian from putting on any evidence of damages  
11 now, and I think that's pretty obvious from my  
12 ruling on the other motion in limine, because I do  
13 think it's premature.

14 I think by all rights and based on the  
15 express language of the interrogatories, the first  
16 set of interrogatories that the City of Meridian  
17 should have up to 45 days before trial, and we can  
18 revisit the issue if there are named experts who  
19 have not yet complied with their 26(b)(4) opinions  
20 after that date, after 45 days before trial. And  
21 I think that's it on that issue.

22 Now, Mr. -- we have one more thing to  
23 argue today, one more set of motions in limine.  
24 But first I want to make it clear, as I've made my  
25 rulings on two of the three matters that are set

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1 THE COURT: And then the three other  
2 fellows.

3 MR. TROUT: I don't know if this will come  
4 up or not, Judge, but hopefully it will. Let me  
5 direct the court's attention first to the issue of  
6 Mr. Bennett and Mr. Coughlin and Mr. Frank.

7 This document that I've placed up on  
8 the screen, for purposes of the record, Judge, is  
9 the memorandum in opposition to plaintiff's motion  
10 to strike the affidavits of Bennett, Coughlin,  
11 Frank, and Lemley that was filed by Petra.

12 The representation made to the court  
13 was, with regard to Bennett, Frank, and Coughlin,  
14 that are not designated as experts and were all  
15 disclosed as fact experts in Petra's discovery  
16 responses August 21, 2009. They have not been  
17 retained as experts.

18 And the fundamental problem we have is,  
19 pursuant to the court's order, as you'll recall  
20 back in June, we asked for the opportunity to  
21 conclude the depositions of Mr. Bennett and  
22 Mr. Coughlin in response to the motion for summary  
23 judgment. We did conclude those depositions based  
24 upon our understanding they were fact witnesses  
25 and they were not expert witnesses.

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<p>1 And now on September 15, I believe, of 2 2010, they have been designated as expert 3 witnesses, and as such, with those depositions 4 concluded, we're now precluded from continuing 5 taking their depositions unless we're allowed 6 leave of the court to redepose them now with 7 respect to some expert opinion that is yet to be 8 disclosed. They've simply been disclosed as 9 experts.</p> <p>10 And it's on that basis that we think 11 we're prejudiced, and we ask the court to exclude 12 them as expert witnesses in this matter.</p> <p>13 Now, with respect to Mr. Lemley, and 14 I'll switch to the next motion because this is the 15 one -- and I apologize for this little glitch -- 16 the basis for excluding Mr. Lemley as an expert is 17 that he is not acting as the expert.</p> <p>18 THE COURT: Right. He consulted with these 19 other folks, and he is just restating the opinions 20 that these other individuals have expressed to 21 him.</p> <p>22 MR. TROUT: More importantly, he is not 23 acting as the expert. This is an excerpt from 24 page 2 of 12 of the Lemley international report, 25 and I'm going to direct the court's attention to</p> <p style="text-align: right;">Page 57</p>	<p>1 you're going to argue. So I just wanted to say 2 that for the record.</p> <p>3 MR. WALKER: Understood, Judge. Thank you.</p> <p>4 THE COURT: Thank you.</p> <p>5 Mr. Walker, I'll hear your opposition 6 to Mr. Trout's motions in limine.</p> <p>7 MR. WALKER: Thank you, Your Honor. Well, 8 curiously Mr. Trout put up the report that was 9 prepared by Mr. Lemley and Mr. Bauer to disclose 10 experts as well as the staff at Lemley 11 International. What he didn't put up was 12 Jack Lemley's affidavit which clearly states that 13 it's his opinion to a reasonable degree of 14 professional certainty that Petra's work complied 15 with the applicable standard of care and that the 16 court has that affidavit that has been in the 17 record since way last spring.</p> <p>18 So that Mr. Lemley, irrespective of 19 what the report says, did find or did reach an 20 independent judgment that Petra's work conformed 21 to the applicable standard of care as well as the 22 other things that he states in his affidavit.</p> <p>23 With regard to Bennett, Coughlin, and 24 Frank, the court knows and has already said, we 25 didn't disclose them until December 15. And</p> <p style="text-align: right;">Page 59</p>
<p>1 the very last paragraph. It's the one that is the 2 crux of the supposed opinion, and it doesn't say, 3 "This is my opinion."</p> <p>4 This says, In Lemley, LI's, Lemley 5 International's opinion, Petra exercised the care, 6 skill, and judgment, et cetera.</p> <p>7 So our basis for the exclusion of 8 Mr. Lemley is, A, he is not a licensed 9 construction manager; B, this isn't his opinion. 10 It's the opinion of an entity, and under Rule 702, 11 experts are required to be witnesses. An entity 12 cannot be a witness, and as such, Judge, 13 Mr. Lemley is, A, not qualified; B, relying on 14 others; and C, not stating a personal opinion but 15 stating an opinion of an entity which cannot be 16 qualified as an expert witness under Rule 702.</p> <p>17 THE COURT: Thank you.</p> <p>18 And, Mr. Trout, I just want to make it 19 clear for the record, a moment ago when I made a 20 statement regarding my understanding of the 21 reasons underlying your motion to exclude 22 Jack Lemley as an expert, that was the court not 23 offering an opinion or making a finding of fact, 24 it was just me saying this to let you know that 25 this is how far that -- what I anticipate that</p> <p style="text-align: right;">Page 58</p>	<p>1 primarily they're rebuttal experts.</p> <p>2 And with regard to the content of their 3 opinions, those are fully set forth in the 4 disclosure that conforms to the requirements of 5 Rule 24(b)(6) -- or excuse me, 26(b)(4).</p> <p>6 And so we think that for purposes of 7 trial, these gentlemen who have extensive decades 8 long experience in the construction industry can 9 give an opinion with respect to whether or not 10 Petra conformed its work to the standard of care.</p> <p>11 Thank you, Your Honor.</p> <p>12 THE COURT: Thank you.</p> <p>13 MR. TROUT: Nothing further, Judge.</p> <p>14 THE COURT: All right. I'm going to deny 15 both of these motions for this reason.</p> <p>16 I believe that the Lemley affidavit and 17 opinion is purported to be the opinion of 18 Jack Lemley, who is a named expert in the case and 19 he was disclosed timely.</p> <p>20 And although it wasn't argued, this 21 wasn't the precise basis of the argument at oral 22 argument today, my understanding was that when we 23 had our last hearing last week, well, today I 24 anticipated that the argument would focus on the 25 basis for Jack Lemley's affidavit which was the --</p> <p style="text-align: right;">Page 60</p>

<p>1 which were the interviews that he conducted, he</p> <p>2 and another gentleman conducted with other</p> <p>3 individuals who were familiar with the facts and</p> <p>4 circumstances of the case, and that those were the</p> <p>5 types of sources of information that experts in</p> <p>6 this field rely upon to form expert opinions.</p> <p>7 So I'm going to deny the motion with</p> <p>8 respect to Jack Lemley as an expert, and I'm going</p> <p>9 to deny the motion with respect to the other three</p> <p>10 individuals, Coughlin --</p> <p>11 MR. TROUT: If I might assist, Judge,</p> <p>12 Bennett and Frank.</p> <p>13 THE COURT: Thank you, Coughlin, Bennett,</p> <p>14 and Frank. These individuals were disclosed as</p> <p>15 lay witnesses, fact witnesses, as opposed to</p> <p>16 expert witnesses, until the day before the</p> <p>17 expiration of the deadline for disclosure of</p> <p>18 expert witnesses. On the day before the deadline</p> <p>19 for disclosure of expert witnesses, they were</p> <p>20 designated as expert witnesses.</p> <p>21 To the extent that this may</p> <p>22 prejudice -- the fact that they weren't named as</p> <p>23 expert witnesses at the time, as I understand it</p> <p>24 that Meridian already took their depositions, I'm</p> <p>25 going to grant Meridian the opportunity if they</p> <p style="text-align: right;">Page 61</p>	<p>1 REPORTER'S CERTIFICATE</p> <p>2</p> <p>3</p> <p>4</p> <p>5 I, Dianne E. Cromwell, Official Court</p> <p>6 Reporter, County of Ada, State of Idaho, hereby</p> <p>7 certify:</p> <p>8 That I am the reporter who took the</p> <p>9 proceedings had in the above-entitled action in</p> <p>10 machine shorthand and thereafter the same was</p> <p>11 reduced into typewriting under my direct</p> <p>12 supervision; and</p> <p>13 That the foregoing transcript contains a</p> <p>14 full, true, and accurate record of the proceedings</p> <p>15 had in the above and foregoing cause, which was</p> <p>16 heard at Boise, Idaho.</p> <p>17 IN WITNESS WHEREOF, I have hereunto set</p> <p>18 my hand October 5, 2010.</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23 Dianne E. Cromwell, Official Court Reporter</p> <p>24 CSR No. 21</p> <p>25</p> <p style="text-align: right;">Page 63</p>
<p>1 wish to take the depositions of those three</p> <p>2 individuals to clear up any matters involving</p> <p>3 their expertise.</p> <p>4 I wouldn't anticipate those would be</p> <p>5 lengthy -- well, I won't say. I don't know how</p> <p>6 long those could take. But anyway, if Meridian</p> <p>7 believes that there is a need to retake the</p> <p>8 depositions of any or all of those three now</p> <p>9 expert witnesses, they may do so, but in any event</p> <p>10 no later than 45 days before trial.</p> <p>11 MR. TROUT: Thank you, Judge.</p> <p>12 THE COURT: And, Mr. Walker, you prepare the</p> <p>13 order with respect to those two motions in limine.</p> <p>14 MR. WALKER: Yes, Your Honor.</p> <p>15 THE COURT: Folks, do we have something else</p> <p>16 teed up next week?</p> <p>17 MR. WALKER: On Monday, Your Honor.</p> <p>18 THE COURT: Good. It wouldn't be Monday</p> <p>19 without a hearing on one of these matters, so I</p> <p>20 appreciate that. Anything else, folks?</p> <p>21 MR. WALKER: That's it, sir.</p> <p>22 THE COURT: Thank you. The court will be in</p> <p>23 recess until 4 p.m.</p> <p>24 (Proceedings concluded.)</p> <p>25 --o0o--</p> <p style="text-align: right;">Page 62</p>	

OCT 14 2010

J. DAVID NAVARRO, Clerk  
By CARLY LATIMORE  
DEPUTY

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S MOTION FOR ORDER  
APPROVING PERMISSION TO APPEAL  
FROM AN INTERLOCUTORY ORDER  
PURSUANT TO IDAHO APPELLATE  
RULE 12**

COMES NOW the Plaintiff City of Meridian ("Plaintiff" or "City"), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., and hereby submits the following Memorandum in Support of Plaintiff's Motion for Order Approving Permission to Appeal from an Interlocutory Order, Pursuant to Idaho Appellate Rule 12.

**I. INTRODUCTION**

As the Court is well aware, this litigation arises out of a dispute between the City and Defendant Petra, Incorporated ("Defendant" or "Petra") concerning the construction of the Meridian City Hall Building, located in Ada County, Idaho. Of significance to the City's present motion is Petra's Counterclaim, which was filed on May 7, 2009, without satisfying the notice

requirements to the City pursuant to the Idaho Tort Claims Act (“ITCA”) and Idaho Code § 50-219. Accordingly, the City has moved to dismiss Petra’s counterclaims for its failure to provide the required notice to the City. Naturally, Petra opposed the City’s Motion to Dismiss and, on September 29, 2010, the Court entered its order denying the City’s motion. As a result, pursuant to Idaho Appellate Rule 12, the City seeks an order granting the City permission to immediately appeal from the September 29, 2010 interlocutory order.

## II. ARGUMENT

In denying the City’s Motion to Dismiss, the Court determined that (1) Petra’s claims against the City did not “accrue” for purposes of the ITCA until Petra’s request for Change Order 2 was denied, and (2) Petra’s letter to the City’s attorney, not the city clerk or secretary, was sufficient to meet the requirements of ITCA and Section 50-219. *Glynn Affidavit*, Ex. A, *September 27, 2010 Hearing Transcript* pp. 37-38. The legal issues of (1) when a claim arises for purposes of providing notice to a city under ITCA and Section 50-219 and (2) whether notice of a claim against a city must be provided to the city clerk or secretary are controlling questions of law as to which there is substantial ground for difference of opinion. Given that the answer to these questions will significantly and unmistakably impact the trial proceedings, an immediate appeal from the Order Denying the City’s Motion to Dismiss would materially advance the orderly and efficient resolution of this litigation.

Idaho Appellate Rule 12 gives the Court discretion to grant permission to appeal an interlocutory order of a district court, “which is not otherwise appealable under these rules, but which involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order ... may materially advance the orderly resolution of the litigation.” *Id.* The Idaho Supreme Court has stated that the intent of Rule 12 is to provide an immediate appeal from an interlocutory order if there are substantial legal issues of great



public interest or if there are legal questions of first impression. *Budell v. Todd*, 105 Idaho 2, 4, 665 P.2d 701, 703 (1983).

In this case, the standards set forth in Rule 12 are met. The Court's Order denying Plaintiff's Motion to Dismiss involves: (1) controlling questions of law; (2) there is substantial ground for difference of opinion as to the Court's Order; and (3) an appeal would materially advance the orderly resolution of the litigation. In addition, both intents of the Rule, as stated by the Supreme Court, will be served by an appeal at this juncture because legal questions of first impression are present, as are substantial issues of great public interest.

**A. The Court's Order Involves Controlling Questions of Law.**

In denying the City's motion, the Court held that (1) Petra's claims against the City did not arise until the City denied Petra's request for a Change Order on February 24, 2009 and (2) that the notice provisions of Idaho Code § 50-219 and the ITCA were satisfied with a letter to the City's attorney and not the City Clerk or Secretary. *Glynn Affidavit*, Ex. A. Both of these points of law are controlling, and should either of them be reversed, Petra's counterclaims would be dismissed before proceeding to trial.

**B. There Are Substantial Grounds for Difference of Opinion as to the Court's Order, and Whether Petra's Letter to the City's Attorney Was Sufficient to Meet the Requirements of the ITCA and Section 50-219 Which Are Questions of First Impression in Idaho.**

Suffice it to say, without repeating all of City's arguments set forth in its Memorandum in Support, Reply Memorandum in Support of its Motion to Dismiss and at oral argument, substantial grounds exist for a difference of opinion as to the Court's Order. In denying the City's Motion to Dismiss, the Court specifically held that "[t]he cause of action didn't accrue fully until February 24, 2009 when the claim was denied." *Glynn Affidavit*, Ex. A, *September 27, 2010 Hearing Transcript* p. 37. "That is when Petra was reasonably put on notice that it had a claim." *Id.* The Court further stated that "[a]lthough the act specifies that notice under the Tort Claim Act has to be given to the

secretary or clerk of the agency involved in this case, the entity, the city, was represented by counsel, and notice was given to the city through their attorney of record on March 16, 2009.” *Glynn Affidavit*, Ex. A, *September 27, 2010 Hearing Transcript* pp. 37-38.

In making the above determinations, the Court disregarded Idaho case law on point and the plain language of the ITCA supporting the opposite conclusion. Thus, in addition to the fact that controlling authority exists supporting the City’s position, an immediate appeal would also satisfy one of the intents of Rule 12 because the Idaho Supreme Court has not yet addressed whether notice to a city attorney satisfies the notice requirements of the ITCA.

**1. For Purposes of the ITCA, a Claim Arises as soon as Petra Should Have Reasonably Discovered its Claim Against the City.**

Idaho Code § 6-906 requires that all claims against a political subdivision “shall be presented to and filed with the clerk or secretary of the political subdivision within one hundred eighty (180) days from **the date the claim arose or reasonably should have been discovered**, whichever is later.” *Id.* (emphasis added). “The statute does not begin running when a person fully understands the mechanism of the injury and the government’s role, but rather when he or she is aware of such facts that would cause a reasonably prudent person to inquire further into the circumstances surrounding the incident.” *Mallory v. City of Montpelier*, 126 Idaho 446, 448, 885 P.2d 1162, 1164 (Ct. App. 1994). “[I]t is clear that failure to comply with the notice requirement bars a suit regardless of how legitimate it might be.” *Driggers v. Grafe*, 148 Idaho 295, 297, 221 P.2d 521, 523 (Ct. App. 2009).

It is evident from the record present in these proceedings that Petra knew, or reasonably should have discovered, the existence of its claims against the City as early as January and as late as July of 2007. Once again this Court must be mindful that Petra’s claim for damages is premised upon the increase in the cost of the Meridian City Hall Project. Accordingly, as Petra’s claim for damages is premised upon the increase in cost, its claim for damages arose, or reasonably should have been known, upon Petra’s first notice of the fact that the cost of construction exceeded the

\$12.2 Million identified in the CMA. As the Idaho Supreme Court recognized in *Mitchell v. Bingham Memorial Hosp.*, 130 Idaho 420, 423, 942 P.2d 544, 547 (1997), “a claimant is not required to know all the facts and details of a claim because such a prerequisite would allow a claimant to delay completion of their investigation before triggering the notice requirement.” *See also Magnuson Properties Partnership v. City of Coeur d’Alene*, 138 Idaho 166, 59 P.3d 971 (2002) (stating that “the 180-day notice period begins to run at the occurrence of a wrongful act, even if the extent of damages is not known or is unpredictable at the time.”).

As set forth in detail in the City’s Memorandum in Support of Motion for Summary Judgment filed on September 1, 2010, as early as January of 2007 Petra began representing to the City that the estimated cost of construction was in excess of \$12.2 Million (\$16,867,220) and, more importantly, represented that Petra’s construction management fee would remain unchanged regardless. (City’s Memorandum in Support of Summary Judgment, pages 5-12)

Rather than present its claim for an increase in its construction management fee based on the increase in cost at that time as required by the CMA’s express terms as well as the ITCA, Petra did nothing. A pattern of silence that it continued in the subsequent representations to the City occurring in February, April, and July of 2007. For this reason, the importance of a timely presentation of a claim, under either the ITCA or the CMA, is evident. Had Petra disclosed in January of 2007, or at anytime thereafter through July 2007, that it would seek a construction management fee in excess of that previously agreed, both parties would have been able to timely address, and potentially resolve, at least one issue of the dispute between the parties that would ultimately arise two years later.

As Petra rightly concedes, this is precisely the purpose to which the ITCA is aimed. (Petra Opposition to the City’s Motion to Dismiss, page 10.) One of the primary purposes of the ITCA is “to save needless expense and litigation by providing an opportunity for amicable resolution of the

differences between parties...” *Pounds v. Denison*, 120 Idaho 425, 426-27, 816 P.2d 982, 983-84 (1991). Petra failed to present a proper and timely notice to the City at a time when it knew, or should have reasonably discovered, it believed it had a claim against the City for an increase in the construction management fee given the increased estimated costs of construction that it was actively generating. Therefore, a controlling question of law exists whether Petra’s claims arose before receiving a denial of its requested change order by the City.

**2. Notice of a Claim for Purpose of the ITCA is Required to be Given to the Clerk or Secretary for the Political Subdivision.**

In the event that Petra is not deemed to have discovered its claim against the City until February 24, 2009, Petra still failed to provide notice as required by the ITCA.

Idaho Code § 6-906 states:

All claims against a political subdivision [subdivision] arising under the provisions of this act and all claims against an employee of a political subdivision for any act or omission of the employee within the course or scope of his employment **shall be presented to and filed with the clerk or secretary of the political subdivision** within one hundred eighty (180) days from the date the claim arose or reasonably should have been discovered, whichever is later.

*Id.* (emphasis added). Contrary to the plain language of Section 6-906, Petra failed to provide notice the City Clerk or Secretary. “If the statutory language is unambiguous, we merely apply the statute as written.” *Lopez v. State*, 136 Idaho 174, 178, 30 P.3d 952, 956 (2001).

Interpretation of a statute by the Idaho judiciary can involve textual and contextual analysis, both of which are guided by a series of long-held maxims. We begin with examination of the literal words of the statute. If we conclude that this language is clear and unambiguous, we will simply apply the statute as written.

*State v. Folsom*, 139 Idaho 627, 630, 84 P.3d 563, 566 (Ct. App. 2003).

Again, “the literal words of the statute provide the best guide to legislative intent, and therefore, the interpretation of a statute must begin with the literal words of the statute.” *State v. Doe*, 147 Idaho 362, 328, 208 P.3d 730, 732 (2009). “The Court gives the words of a statute their plain, usual, and ordinary meaning.” *Id.*

Here, the statute requires that notice of a claim against a political subdivision, a municipality in this case, must be filed with the “clerk or secretary of the political subdivision” I.C. § 6-906. That language is not ambiguous or confusing. Moreover, the authority is clear that the literal words in the statute provide the best guide when applying and interpreting any given statute. Section 6-906 does not state any representative or employee of the political subdivision, it states the clerk or secretary. If the legislature had intended for the notice to be effective when given to any employee, representative, agent or attorney for the political subdivision, “the statute could easily have been worded to accomplish that purpose.” See *Jacobsen v. City of Rathdrum*, 115 Idaho 266, 766 P.2d 736 (1988); see also *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 947 P.2d 400 (1997).

“[I]t is clear that failure to comply with the notice requirement bars a suit regardless of how legitimate it might be.” *Driggers v. Grafe*, 148 Idaho 295, 297, 221 P.2d 521, 523 (Ct. App. 2009). Petra admits that it did not provide notice to the City Clerk or Secretary. Instead, Petra provided an untimely letter regarding mediation to the City Attorney. Clearly, this action does not meet the requirements of the ITCA, as established by the literal words chosen by the legislature. Therefore, a controlling question of law exists whether a party can deliver notice to the attorney for a political subdivision, which is also a matter of first impression in Idaho.

**C. An Immediate Appeal Will Advance the Orderly Resolution of This Litigation, and and the Controlling Questions of Law at Issue Are of Great Public Interest.**

Given the fact that should either of the Court’s rulings on the controlling questions of law be reversed the result will necessarily affect the orderly resolution of this litigation, allowing Petra’s counterclaims to proceed unnecessarily to trial will significantly impact the outcome, length, and expense of the pending litigation and upcoming trial.

In addition, to satisfying the third requirement of promoting the orderly resolution of the litigation, an immediate appeal will also meet the intent of Rule 12 because these issues involve a great public interest by potentially saving the taxpayers of the City of Meridian the additional time

and expense of a longer and more complicated trial. In addition, both Petra and the City will have many employees spending time in trial, which time could be significantly less if Petra's counterclaims are deemed to be barred. Thus, in this case, an appeal concerning the controlling questions of law will determine whether Petra's counterclaims proceed to trial, which determination will necessary affect both a great public interest and the orderly resolution of this litigation.

### III. CONCLUSION

For the reasons set forth above, the City respectfully request that this Court grant it permission to appeal the Order denying the City's Motion to Dismiss Petra's Counterclaim to the Idaho Supreme Court.

DATED this 13 day of October, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.

By 

Daniel Loras Glynn  
Attorneys for Plaintiff

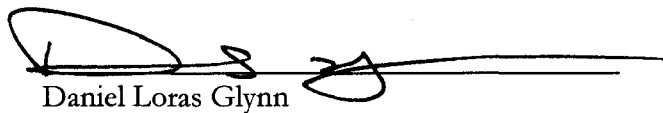
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 14 day of October, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
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Fax  
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<input type="checkbox"/>
<input type="checkbox"/>
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Daniel Loras Glynn

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 3:37

OCT 20 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**NOTICE OF HEARING RE:  
PLAINTIFF'S MOTION FOR ORDER  
APPROVING PERMISSION TO APPEAL  
FROM AN INTERLOCUTORY ORDER  
PURSUANT TO IDAHO APPELLATE  
RULE 12**

PLEASE TAKE NOTICE, That the undersigned, attorneys for the City of Meridian, ("Meridian"), the Plaintiff in the above-entitled matter, will bring before the Honorable Ronald J. Wilper of the above-entitled Court, for hearing at the Ada County Courthouse, 200 West Front Street, Boise, Idaho 83702, on Monday, the 15<sup>th</sup> day of November, 2010, at the hour of 11:00 a.m. or as soon thereafter as counsel can be heard, Plaintiff's Motion for Order Approving Permission to Appeal from an Interlocutory Order Pursuant to Idaho Appellate Rule 12.



DATED this 20<sup>th</sup> day of October, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
GOURLEY, P.A.

By: 

Daniel Loras Glynn  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 20th day of October, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

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Fax  
Fed. Express  
Email

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<input type="checkbox"/>

  
Daniel Loras Glynn

ORIGINAL

NO. \_\_\_\_\_ FILED 3:45  
A.M. \_\_\_\_\_ P.M.

OCT 20 2010

J. DAVID NAVARRO, Clerk  
By CARLY LATIMORE  
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Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**NOTICE OF TAKING AUDIO-VIDEO  
DEPOSITION *DUCES TECUM* OF  
THOMAS J. SOUTH**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of **Thomas J. South**, on **Thursday the 11th day of November, 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents<sup>1</sup> provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;<sup>2</sup>
2. All documents utilized by you in the rendering of your opinion in this matter;

---

<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

<sup>2</sup> "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.

3. Your personal notes, including in electronic and all other forms, regarding this matter;
4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;<sup>3</sup>
5. Your work notes, including in electronic and any other form, regarding this matter;
6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;
7. Meeting notes regarding this matter;
8. Calendars<sup>4</sup> appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;<sup>5</sup>
9. All communications<sup>6</sup> between you and any employee, consultant or agent of you and any person related to this matter<sup>7</sup>;
10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.
11. All recordings, either voice or video, related to this matter.

---

<sup>3</sup> The terms "employee, consultant and agent" reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

<sup>4</sup> Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

<sup>5</sup> This request is specific for the calendar appointments related to this matter.

<sup>6</sup> "Communications" mean any and all written or oral communications, including but not limited to inter- or intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

<sup>7</sup> "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

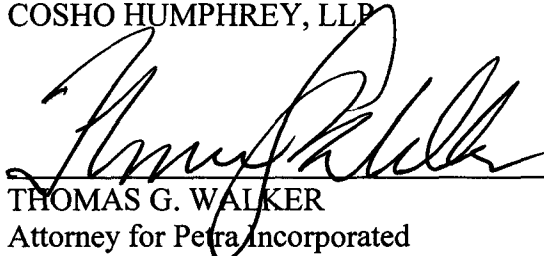
12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: October 20, 2010.

COSHO HUMPHREY, LLP



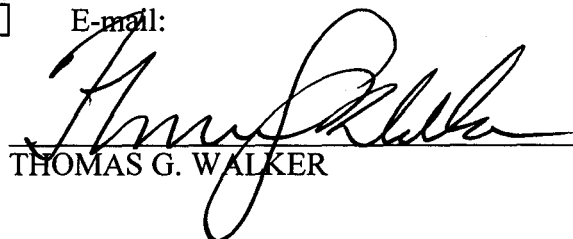
THOMAS G. WALKER  
Attorney for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20<sup>th</sup> day of October, 2010, a true and correct copy of the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Overnight Courier
- ☒ Facsimile:
- ☐ E-mail:

  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_ FILED 3:45  
A.M. \_\_\_\_\_ P.M.

OCT 20 2010

J. DAVID NAVARRO, Clerk  
By CARLY LATIMORE  
DEPUTY

Thomas G. Walker (ISB 1856)  
Erika Klein (ISB 5509)  
Mackenzie Whatcott (ISB 6774)  
Matthew Schelstrate (ISB 8276)  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
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E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com)  
[mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com).

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**AMENDED NOTICE OF TAKING OF  
THE AUDIO-VIDEO DEPOSITION OF  
THE CITY OF MERIDIAN, *DUCES  
TECUM*, PURSUANT TO I.R.C.P.  
30(b)(4) AND 30(b)(6) – CLAIMS  
OTHER THAN DAMAGES**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEYS OF RECORD**

**YOU ARE HEREBY NOTIFIED** that Defendant/Counterclaimant, Petra Incorporated  
("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon

oral examination pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure, of Theodore W. Baird, Jr. ("Baird"), the person designated by the City of Meridian ("Meridian" or "City") as the most knowledgeable regarding the allegations by the City set forth in paragraphs 4 through 21 of the City's Complaint filed on April 16, 2009, and as claimed in paragraphs 4 through 19, 23, 26 through 28, 31 through 37, 40 through 47, 50 through 52, and 55 of the City's proposed First Amended Complaint. According to the City's designation, Baird is the person most knowledgeable regarding: (1) the facts the City claims support Petra's alleged breach of contract, (2) the facts the City claims support Petra's alleged breach of the covenant of good faith and fair dealing, (3) the facts the City claims support Petra's alleged unjust enrichment, (4) the facts the City claims support Petra's alleged fraud and fraud in the inducement, (5) the facts the City claims support Petra's alleged constructive fraud, (6) the facts the City claims support Petra's alleged gross negligence, and (7) the facts the City claims support Petra's alleged oppressive, malicious, fraudulent or outrageous conduct.

The primary objective of the Rule 30(b)(6) deposition is to inquire of Baird who may testify regarding the foregoing matters at trial.

The deposition will be taken on **Friday, November 5, 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed.

The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video



means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires Baird to produce and make available for inspection and copying at the deposition all documents supporting the City of Meridian's claims described above.

This deposition will be taken pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter. The attorney taking the deposition or an employee of Cosho Humphrey, LLP may operate the audio-video equipment.

DATED: October 20, 2010.

COSHO HUMPHREY, LLP

A handwritten signature in black ink, appearing to read "Thomas G. Walker", is written over a horizontal line.

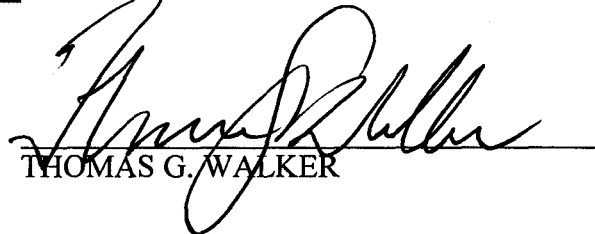
THOMAS G. WALKER  
Attorneys for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20<sup>th</sup> day of October, 2010, a true and correct copy of the within and foregoing Notice of Taking Audio Video Deposition, *Duces Tecum*, was served upon:

Kim J. Trout, Esq.  
Daniel L. Glynn, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Overnight Courier
- ☒ Facsimile:
- ☐ E-mail:

  
THOMAS G. WALKER

ORIGINAL

NC. \_\_\_\_\_ FILED \_\_\_\_\_ 3:45  
AM. \_\_\_\_\_ P.M.

OCT 20 2010

J. DAVID NAVARRO, Clerk  
By CARLY LATIMORE  
DEPUTY

Thomas G. Walker (ISB 1856)  
Erika Klein (ISB 5509)  
Mackenzie Whatcott (ISB 6774)  
Matthew Schelstrate (ISB 8276)  
COSH O HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com)  
[mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com).

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

AMENDED NOTICE OF TAKING OF  
THE AUDIO-VIDEO DEPOSITION OF  
THE CITY OF MERIDIAN, *DUCE*  
*TECUM*, PURSUANT TO I.R.C.P.  
30(b)(4) AND 30(b)(6) – DAMAGES

TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEYS OF RECORD

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated  
("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon

AMENDED NOTICE OF TAKING OF THE AUDIO-VIDEO DEPOSITION OF THE CITY OF MERIDIAN,  
*DUCE* *TECUM*, PURSUANT TO I.R.C.P. 30(b)(4) AND 30(b)(6) – DAMAGES

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Page 1

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oral examination pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure, of Steven J. Amento ("Amento"), the person designated by the City of Meridian ("Meridian" or "City") as the most knowledgeable regarding the damages that the City has allegedly suffered as claimed in paragraph 22 of the City's Complaint filed on April 16, 2009, and as claimed in paragraphs 20, 24, 38, 48, 53, and 55 of the City's proposed First Amended Complaint. According to the City's designation, Amento is the person most knowledgeable regarding: (1) each element of damage, (2) the amount of damage arising with respect to each element, (3) the method of calculating the amount of damage arising with respect to each element, (4) the assumptions underlying the calculation of the amount of damage arising with respect to each element, and (5) the cause or causes of the damage arising with respect to each element. Further, according to the City, Amento is the most knowledgeable person regarding the unjust enrichment claim set forth in paragraph 29 of the City's proposed First Amended Complaint, including (1) each element of unjust enrichment, (2) the amount of unjust enrichment arising with respect to each element, (3) the method of calculating the amount of unjust enrichment arising with respect to each element, (4) the assumptions underlying the calculation of the amount of unjust enrichment arising with respect to each element, and (5) the cause or causes of the unjust enrichment arising with respect to each element. The primary objective of the Rule 30(b)(6) deposition is to inquire of Amento who may testify regarding the foregoing matters at trial.

The deposition will be taken on **Thursday, November 4, 2010** beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed.

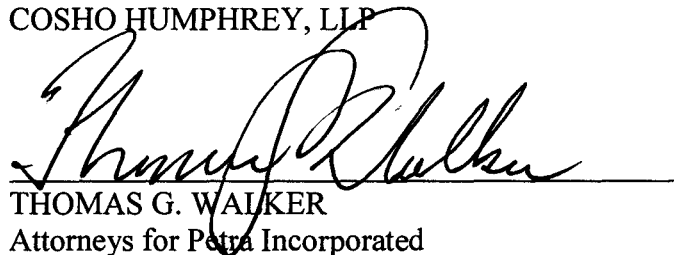
The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires Amento to produce and make available for inspection and copying at the deposition all documents supporting the City of Meridian's claims of damages and unjust enrichment.

This deposition will be taken pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter. The attorney taking the deposition or an employee of Cosho Humphrey, LLP may operate the audio-video equipment.

DATED: October 20, 2010.

COSHO HUMPHREY, LLP

A handwritten signature in black ink, appearing to read "Thomas G. Walker", is written over a horizontal line.


THOMAS G. WALKER  
Attorneys for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20<sup>th</sup> day of October, 2010, a true and correct copy of the within and foregoing Notice of Taking Audio Video Deposition, *Duces Tecum*, was served upon:

Kim J. Trout, Esq.  
Daniel L. Glynn, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Overnight Courier
- ☒ Facsimile:
- ☐ E-mail:

  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. *3/4/10*

OCT 20 2010

J. DAVID NAVARRO, Clerk  
By CARLY LATIMORE  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
COSH O HUMPHREY, LLP  
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Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**AMENDED NOTICE OF TAKING  
AUDIO-VIDEO DEPOSITION *DUCES*  
*TECUM* OF MIKE SIMMONDS**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of Mike Simmonds, on Wednesday the 27th day of October 2010, beginning at the hour of 9:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents<sup>1</sup> provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;<sup>2</sup>
2. All documents utilized by you in the rendering of your opinion in this matter;

---

<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

<sup>2</sup> "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.



3. Your personal notes, including in electronic and all other forms, regarding this matter;
4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;<sup>3</sup>
5. Your work notes, including in electronic and any other form, regarding this matter;
6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;
7. Meeting notes regarding this matter;
8. Calendars<sup>4</sup> appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;<sup>5</sup>
9. All communications<sup>6</sup> between you and any employee, consultant or agent of you and any person related to this matter<sup>7</sup>;
10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.
11. All recordings, either voice or video, related to this matter.

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<sup>3</sup> The terms "employee, consultant and agent" reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

<sup>4</sup> Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

<sup>5</sup> This request is specific for the calendar appointments related to this matter.

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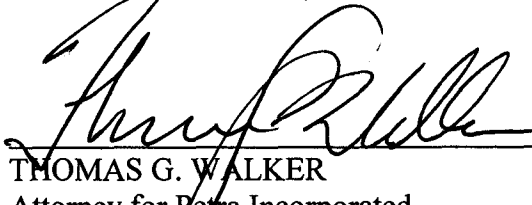
12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: October 20, 2010.

COSHO HUMPHREY, LLP

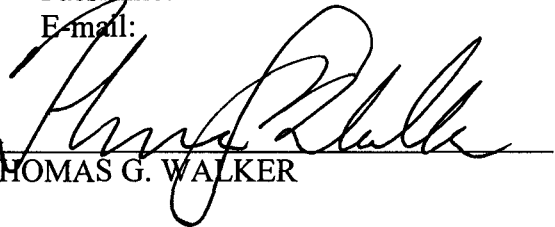
  
THOMAS G. WALKER  
Attorney for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20<sup>th</sup> day of October, 2010, a true and correct copy of the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☐ U.S. Mail  
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☐ E-mail:

  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 3:45

OCT 20 2010

J. DAVID NAVARRO, Clerk  
By CARLY LATIMORE  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
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E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**AMENDED NOTICE OF TAKING  
AUDIO-VIDEO DEPOSITION *DUCES*  
*TECUM* OF LEO GEISS**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of Leo Geiss, on Thursday the 28th day of October 2010, beginning at the hour of 11:00 a.m., at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents<sup>1</sup> provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;<sup>2</sup>
2. All documents utilized by you in the rendering of your opinion in this matter;

---

<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

<sup>2</sup> "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.

3. Your personal notes, including in electronic and all other forms, regarding this matter;
4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;<sup>3</sup>
5. Your work notes, including in electronic and any other form, regarding this matter;
6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;
7. Meeting notes regarding this matter;
8. Calendars<sup>4</sup> appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;<sup>5</sup>
9. All communications<sup>6</sup> between you and any employee, consultant or agent of you and any person related to this matter<sup>7</sup>;
10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.
11. All recordings, either voice or video, related to this matter.

---

<sup>3</sup> The terms "employee, consultant and agent" reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

<sup>4</sup> Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

<sup>5</sup> This request is specific for the calendar appointments related to this matter.

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<sup>7</sup> "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

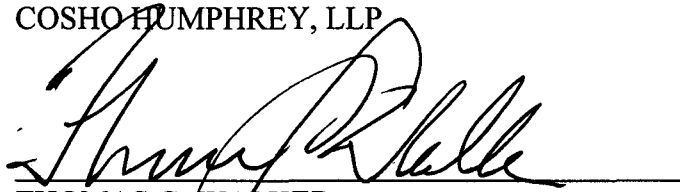
12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: October 20, 2010.

COSHO HUMPHREY, LLP



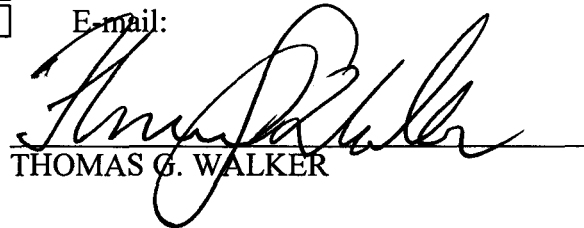
THOMAS G. WALKER  
Attorney for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20<sup>th</sup> day of October, 2010, a true and correct copy of the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Overnight Courier
- ☒ Facsimile:
- ☐ E-mail:

  
THOMAS G. WALKER



ORIGINAL

NO. \_\_\_\_\_ FILED 3:45  
A.M. \_\_\_\_\_ P.M.

OCT 20 2010

J. DAVID NAVARRO, Clerk  
By CARLY LATIMORE  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**AMENDED NOTICE OF TAKING THE  
CONTINUED AUDIO-VIDEO  
DEPOSITION *DUCES TECUM* OF  
LAURA KNOTHE**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the continued testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of **Laura Knothe**, on **Wednesday the 3rd day of November, 2010**, beginning at the hour of **1:00 p.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents<sup>1</sup> provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;<sup>2</sup>

---

<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

2. All documents utilized by you in the rendering of your opinion in this matter;
3. Your personal notes, including in electronic and all other forms, regarding this matter;
4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;<sup>3</sup>
5. Your work notes, including in electronic and any other form, regarding this matter;
6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;
7. Meeting notes regarding this matter;
8. Calendars<sup>4</sup> appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;<sup>5</sup>
9. All communications<sup>6</sup> between you and any employee, consultant or agent of you and any person related to this matter<sup>7</sup>;

---

<sup>2</sup> "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.

<sup>3</sup> The terms "employee, consultant and agent" reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

<sup>4</sup> Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

<sup>5</sup> This request is specific for the calendar appointments related to this matter.

<sup>6</sup> "Communications" mean any and all written or oral communications, including but not limited to inter- or -intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

<sup>7</sup> "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

12. All photographs related to this matter;

13. All billing records related to this matter;

14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;

15. Copies of all drafts of your July 6, 2010 affidavit;

16. All agreements entered into between the City of Meridian and you related to this matter; and

17. All agreements entered into between you and Trout Jones related to this matter.

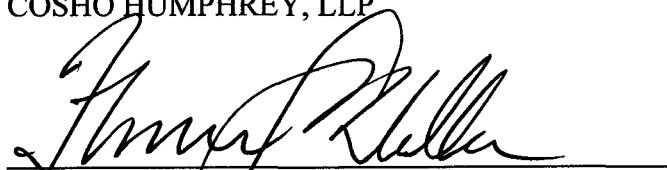
This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.

DATED: October 20, 2010.

COSHO HUMPHREY, LLP



THOMAS G. WALKER  
Attorney for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20<sup>th</sup> day of October, 2010, a true and correct copy of  
the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☐ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☒ Facsimile:  
☐ E-mail:

  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_  
FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 337

OCT 21 2010

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**AMENDED NOTICE OF TAKING  
AUDIO-VIDEO DEPOSITION *DUCES*  
*TECUM* OF NEIL ANDERSON**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

EC

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of **Neil Anderson**, on **Monday the 25th day of October 2010**, beginning at the hour of **1:00 p.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents<sup>1</sup> provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;<sup>2</sup>
2. All documents utilized by you in the rendering of your opinion in this matter;

---

<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writing of every kind, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

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3. Your personal notes, including in electronic and all other forms, regarding this matter;
4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;<sup>3</sup>
5. Your work notes, including in electronic and any other form, regarding this matter;
6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;
7. Meeting notes regarding this matter;
8. Calendars<sup>4</sup> appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;<sup>5</sup>
9. All communications<sup>6</sup> between you and any employee, consultant or agent of you and any person related to this matter<sup>7</sup>;
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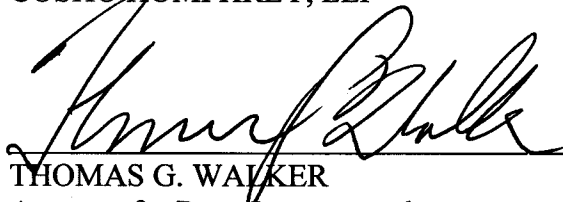
12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: October 21, 2010.

COSHO HUMPHREY, LLP


  
THOMAS G. WALKER  
Attorney for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 21<sup>st</sup> day of October, 2010, a true and correct copy of the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.  
Daniel Glynn  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☐ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☒ Facsimile:  
☐ E-mail:

  
\_\_\_\_\_  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 351

OCT 21 2010

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**SECOND AMENDED NOTICE OF  
TAKING THE CONTINUED AUDIO-  
VIDEO DEPOSITION *DUCES TECUM*  
OF LAURA KNOTHE**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the continued testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of **Laura Knothe**, on **Friday the 5th day of November, 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents<sup>1</sup> provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;<sup>2</sup>

---

<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, an all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

<sup>2</sup> "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.

2. All documents utilized by you in the rendering of your opinion in this matter;
3. Your personal notes, including in electronic and all other forms, regarding this matter;
4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;<sup>3</sup>
5. Your work notes, including in electronic and any other form, regarding this matter;
6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;
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8. Calendars<sup>4</sup> appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;<sup>5</sup>
9. All communications<sup>6</sup> between you and any employee, consultant or agent of you and any person related to this matter<sup>7</sup>;

---

<sup>3</sup> The terms “employee, consultant and agent” reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

<sup>4</sup> Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

<sup>5</sup> This request is specific for the calendar appointments related to this matter.

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<sup>7</sup> “Person” means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term “person” includes any individual or entity capable of holding a legal or beneficial interest in property.

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

12. All photographs related to this matter;

13. All billing records related to this matter;

14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;

15. Copies of all drafts of your July 6, 2010 affidavit;

16. All agreements entered into between the City of Meridian and you related to this matter; and

17. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.

2. Parties will be provided a copy of each DVD.

DATED: October 21, 2010.

COSHO HUMPHREY, LLP



THOMAS G. WALKER  
Attorney for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 21st day of October, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☐ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☒ Facsimile:  
☐ E-mail:

  
\_\_\_\_\_  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 3:57

OCT 21 2010

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**AMENDED NOTICE OF TAKING  
AUDIO-VIDEO DEPOSITION *DUCES*  
*TECUM* OF JASON NEIDIGH**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEY OF RECORD**

EC



YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure, of **Jason Neidigh**, on **Monday the 25th day of October 2010**, beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed. The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, Petra requires the deponent to produce and make available for inspection and/or copying at his deposition the following documents:

1. All documents<sup>1</sup> provided to you from the City of Meridian or from the offices of Trout Jones Gledhill Fuhrman Gourley, P.A. ("Trout Jones") for this matter;<sup>2</sup>
2. All documents utilized by you in the rendering of your opinion in this matter;

---

<sup>1</sup> "Documents" means the original, all copies and drafts of papers and writing of every kinds, description and form, whether handwritten or typed, CDs, DVDs, records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memorandum reports, notebooks, binders, drawings, studies, analyses and drafts, diaries and diary entries, calendars, date books, appointment books, day-timers, desk calendars, intra- or inter-office communications, memoranda, reports, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, job or transaction files, books of account, ledgers, invoices, charge slips, working papers, graphs, charts, evaluation or appraisal reports, contracts, agreements, assignments, instruments, opinions, official statements, certificates, licenses, summaries, audio video or sound recordings, cassette tapes, video recorded electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

<sup>2</sup> "This matter" references the new Meridian City Hall Project, which is the subject matter of this litigation.

3. Your personal notes, including in electronic and all other forms, regarding this matter;

4. Personal notes, including in electronic and all other forms, of any employee, consultant or agent assisting you in this matter;<sup>3</sup>

5. Your work notes, including in electronic and any other form, regarding this matter;

6. Work notes, including electronic and any other form, of any employee, consultant or agent assisting you in this matter;

7. Meeting notes regarding this matter;

8. Calendars<sup>4</sup> appointments of you and any employee, consultant or agent who assisted in you in preparation of your opinion in this matter;<sup>5</sup>

9. All communications<sup>6</sup> between you and any employee, consultant or agent of you and any person related to this matter<sup>7</sup>;

10. All communications between any employee or agent of you and any employee of the City of Meridian and any employee of Trout Jones.

11. All recordings, either voice or video, related to this matter.

---

<sup>3</sup> The terms "employee, consultant and agent" reference any employee, consultant or agent assisting in any way with your investigation, analysis and preparation of any opinion rendered by you regarding this matter.

<sup>4</sup> Calendars include, but are not limited to, desk calendars, electronically maintained calendars, appointment books, day-timers.

<sup>5</sup> This request is specific for the calendar appointments related to this matter.

<sup>6</sup> "Communications" mean any and all written or oral communications, including but not limited to inter- or -intra-office communications, all memoranda, reports, minutes, email correspondence, letters, facsimiles, recorded telephone conversations, notes taken during telephone conversations, notes taken during any interviews or meetings.

<sup>7</sup> "Person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, and trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

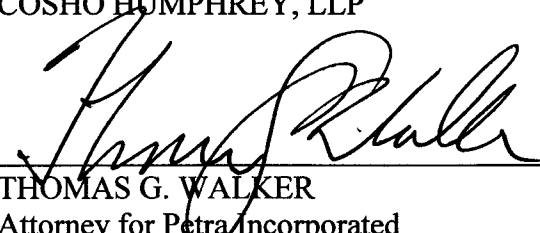
12. All photographs related to this matter;
13. All billing records related to this matter;
14. All draft memos, reports, and other documents, prepared by you or any employee, consultant, or agent of yours regarding this matter;
15. All agreements entered into between the City of Meridian and you related to this matter; and
16. All agreements entered into between you and Trout Jones related to this matter.

This deposition will be taken pursuant to Rules 30(b)(1) and 30(b)(4) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter, and pursuant to the following:

1. The attorney taking the deposition and/or an employee of Cosho Humphrey, LLP will operate the audio-video equipment.
2. Parties will be provided a copy of each DVD.

DATED: October 21, 2010.

COSHO HUMPHREY, LLP

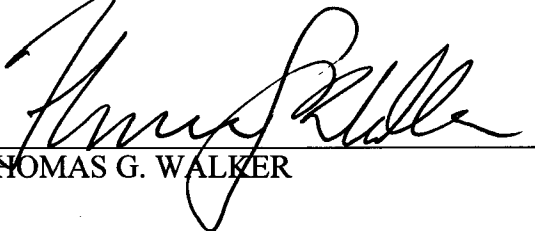
  
\_\_\_\_\_  
THOMAS G. WALKER  
Attorney for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 21st day of October, 2010, a true and correct copy of the within and foregoing document was served upon in the manner specified:

Kim J. Trout, Esq.  
Daniel Loras Glynn  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Overnight Courier
- ☒ Facsimile:
- ☐ E-mail:

  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_ FILED 337  
A.M. \_\_\_\_\_ P.M.

OCT 21 2010

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

Thomas G. Walker (ISB 1856)  
Erika Klein (ISB 5509)  
Mackenzie Whatcott (ISB 6774)  
Matthew Schelstrate (ISB 8276)  
COSH O HUMPHREY, LLP  
800 Park Blvd., Suite 790  
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E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com)  
[mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com).

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**SECOND AMENDED NOTICE OF  
TAKING OF THE AUDIO-VIDEO  
DEPOSITION OF THE CITY OF  
MERIDIAN, *DUCES TECUM*,  
PURSUANT TO I.R.C.P. 30(b)(4) AND  
30(b)(6) – CLAIMS OTHER THAN  
DAMAGES**

**TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEYS OF RECORD**

SECOND AMENDED NOTICE OF TAKING OF THE AUDIO-VIDEO DEPOSITION OF THE CITY OF  
MERIDIAN, *DUCES TECUM*, PURSUANT TO I.R.C.P. 30(b)(4) AND 30(b)(6) – CLAIMS OTHER THAN  
DAMAGES

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Page 1

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EC

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure, of Theodore W. Baird, Jr. ("Baird"), the person designated by the City of Meridian ("Meridian" or "City") as the most knowledgeable regarding the allegations by the City set forth in paragraphs 4 through 21 of the City's Complaint filed on April 16, 2009, and as claimed in paragraphs 4 through 19, 23, 26 through 28, 31 through 37, 40 through 47, 50 through 52, and 55 of the City's proposed First Amended Complaint. According to the City's designation, Baird is the person most knowledgeable regarding: (1) the facts the City claims support Petra's alleged breach of contract, (2) the facts the City claims support Petra's alleged breach of the covenant of good faith and fair dealing, (3) the facts the City claims support Petra's alleged unjust enrichment, (4) the facts the City claims support Petra's alleged fraud and fraud in the inducement, (5) the facts the City claims support Petra's alleged constructive fraud, (6) the facts the City claims support Petra's alleged gross negligence, and (7) the facts the City claims support Petra's alleged oppressive, malicious, fraudulent or outrageous conduct.

The primary objective of the Rule 30(b)(6) deposition is to inquire of Baird who may testify regarding the foregoing matters at trial.

The deposition will be taken on **Wednesday, November 3, 2010**, beginning at the hour of **12:00 p.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed.

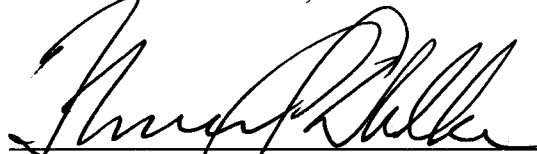
The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires Baird to produce and make available for inspection and copying at the deposition all documents supporting the City of Meridian's claims described above.

This deposition will be taken pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter. The attorney taking the deposition or an employee of Cosho Humphrey, LLP may operate the audio-video equipment.

DATED: October 21, 2010.

COSHO HUMPHREY, LLP

A handwritten signature in black ink, appearing to read "Thomas G. Walker", is written over a horizontal line.

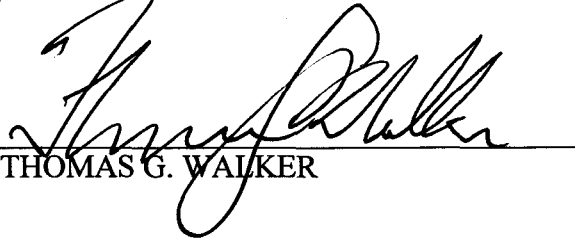
THOMAS G. WALKER  
Attorneys for Petra Incorporated

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 21st day of October, 2010, a true and correct copy of the within and foregoing Notice of Taking Audio Video Deposition, *Duces Tecum*, was served upon:

Kim J. Trout, Esq.  
Daniel L. Glynn, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

<input type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Hand Delivery
<input type="checkbox"/>	Overnight Courier
<input checked="" type="checkbox"/>	Facsimile:
<input type="checkbox"/>	E-mail:

  
THOMAS G. WALKER



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NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 3:37

OCT 21 2010

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika Klein (ISB No. 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
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[eklein@cosholaw.com](mailto:eklein@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**AFFIDAVIT OF THOMAS G. WALKER  
DATED OCTOBER 21, 2010 IN SUPPORT  
OF OPPOSITION TO CITY'S MOTION  
FOR ORDER APPROVING PERMISSION  
TO APPEAL FROM AN  
INTERLOCUTORY ORDER PURSUANT  
TO IDAHO APPELLATE RULE 12**

STATE OF IDAHO )  
 ) ss.  
County of Ada )

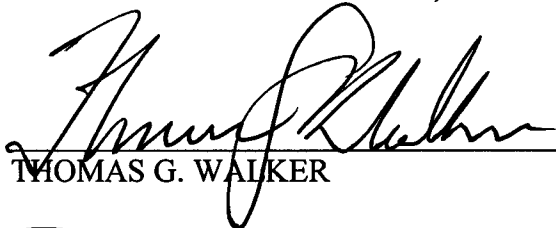
I, THOMAS G. WALKER, being first duly sworn upon oath, depose and state:

1. I am one of the attorneys of record for the Defendant/Counterclaimant, Petra Incorporated ("Petra"), in the above-entitled action and I make this affidavit based on my own personal knowledge of the facts set forth herein.

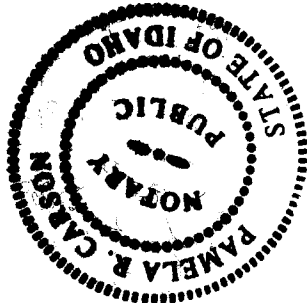
2. I submit this affidavit in support of Petra's Opposition to the City's Motion for Order Approving Permission to Appeal from an Interlocutory Order Pursuant to Idaho Appellate Rule 12.

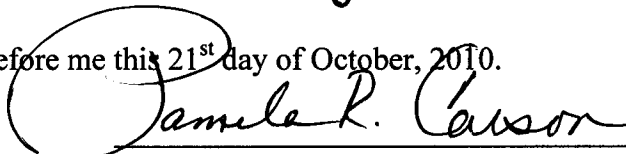
3. In the course of this litigation, the City has produced tens of thousands of documents, including emails between the City's representatives and Petra's representatives, created during the construction of the Meridian City Hall.

4. Attached as **Exhibit A** is a copy of an email exchange between the City's authorized representative, Keith Watts, and Wes Bettis of Petra. This email exchange was produced by the City during litigation, is Bates numbered CM012798-CM012799, and a true and correct copy is accurately reproduced here.

  
THOMAS G. WALKER

SUBSCRIBED AND SWORN to before me this 21<sup>st</sup> day of October, 2010.



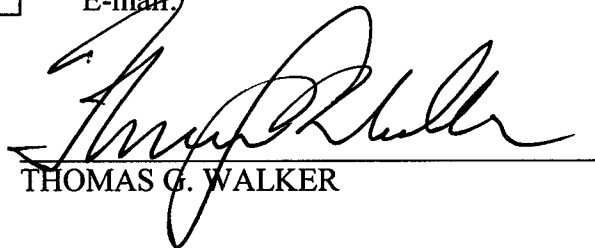
  
Notary Public for Idaho  
Residing at Eagle, Idaho  
My commission expires: March 31, 2016.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21<sup>st</sup> day of October, 2010, a true and correct copy of the within and foregoing document was served upon:

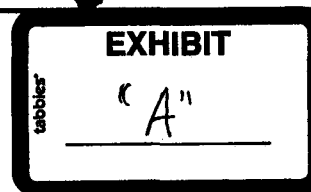
Kim J. Trout, Esq.  
Daniel Loras Glynn  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

<input type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Hand Delivery
<input type="checkbox"/>	Overnight Courier
<input checked="" type="checkbox"/>	Facsimile
<input type="checkbox"/>	E-mail



THOMAS G. WALKER

**From:** Keith Watts  
**Sent:** Wednesday, September 05, 2007 09:08 AM  
**To:** 'Wesley Bettis Jr.'  
**Subject:** RE: City Hall



Good idea on the 2nd one. I will look at Will & Ted's schedule to schedule a meeting and get back to you today. Thanks,

Keith Watts

Purchasing Agent  
City of Meridian  
33 East Idaho Avenue  
Meridian, ID 83642

Ph. 208-888-4433 x207  
Fax: 208-887-4813

From: Wesley Bettis Jr. [mailto:wbettis@petrainc.net]  
Sent: Wednesday, September 05, 2007 9:52 AM  
To: Keith Watts  
Subject: RE: City Hall

Ours is not to question why merely to march on and do or die, right. We will keep submitting ideas and let the Committee and the Council address them accordingly. The next major hurdle is the Plaza and where that comes in price wise.

Any thought on a meeting for the Change Order Request for the CM fee on the Contaminated Soils? I have an informal COR for you to review on the change in project complexity from a \$12.2 Million 80,000 SF to \$19.9 Million 100,000 SF project, but thought I would hold off formal submittal until the Plaza is bid and the final base contract value is determined so that everything stays current and we do not create an image of "nickel and dime-ing" the project. wwbb

From: Keith Watts [mailto:wattsk@meridiancity.org]  
Sent: Wednesday, September 05, 2007 9:45 AM  
To: Wesley Bettis Jr.  
Subject: RE: City Hall

I agree and re-engineering was my term. I simply meant if you find was to save by giving the same quality etc. Just not by cutting something out.

Keith Watts

Purchasing Agent  
City of Meridian  
33 East Idaho Avenue  
Meridian, ID 83642

Ph. 208-888-4433 x207  
Fax: 208-887-4813

From: Wesley Bettis Jr. [mailto:wbettis@petrainc.net]  
Sent: Wednesday, September 05, 2007 9:43 AM  
To: Keith Watts  
Subject: RE: City Hall

Re-engineering what? It is a little late to look at re-engineering structural, mechanical and electrical systems, given the Council mandate to go for LEED Silver Certification. Sorry, just venting a little. We also tried to move the glazing into the frame line of the building, but that

got shot down because it messed up the roof line.

We could have saved quite a bit of money by going to a traditional design, no access floor, traditional box car roof top units and just meet the minimum ICC Energy codes and do all the utilities above the ceilings, but I think we are just a little bit pregnant to be making those changes now. wwdb

From: Keith Watts [mailto:wattsk@meridiancity.org]  
Sent: Wednesday, September 05, 2007 9:29 AM  
To: Wesley Bettis Jr.  
Subject: RE: City Hall

I will inquire about the wire partitions and I need to review the minutes as well for further direction. The feeling was not to lessen the building by eliminating items. Re-engineering would be considered but not so much eliminating.

Keith Watts

Purchasing Agent  
City of Meridian  
33 East Idaho Avenue  
Meridian, ID 83642

Ph. 208-888-4433 x207  
Fax: 208-887-4813

From: Wesley Bettis Jr. [mailto:wbettis@petrainc.net]  
Sent: Wednesday, September 05, 2007 9:08 AM  
To: Keith Watts  
Subject: RE: City Hall

Does this mean the with or without the wire partitions? Anything else from the VE sheet or will this be in the minutes? wwdb

From: Keith Watts [mailto:wattsk@meridiancity.org]  
Sent: Wednesday, September 05, 2007 8:54 AM  
To: Wesley Bettis Jr.; Gene Bennett  
Cc: Adam Johnson  
Subject: City Hall

I got to go to Council last night and talk about the Change Orders. During discussion Council agreed to finish the entire building. That is not leave any areas unfinished. This is to be Petra's official notice of that decision and to move forward accordingly. Council will be receptive to any significant cost savings but leaving the building unfinished is off the table. I will e-mail you the minutes from the meeting as soon as they are available.

Both Change Orders were approved. Please proceed with obtaining contractor signatures.

Keith Watts

Purchasing Agent  
City of Meridian  
33 East Idaho Avenue  
Meridian, ID 83642

Ph. 208-888-4433 x207  
Fax: 208-887-4813

ORIGINAL

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 337

OCT 21 2010

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB No. 5509)  
Mackenzie Whatcott (ISB No. 6774)  
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E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF**

**THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff/Counterdefendant,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant/Counterclaimant

Case No. CV OC 09-7257

**MEMORANDUM IN SUPPORT OF  
PETRA'S OPPOSITION TO CITY'S  
MOTION FOR ORDER APPROVING  
PERMISSION TO APPEAL FROM AN  
INTERLOCUTORY ORDER PURSUANT  
TO IDAHO APPELLATE RULE 12**

The above-named Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its attorney of record, Thomas G. Walker, of the law firm Cosho Humphrey, LLP submits this memorandum in opposition to the City's Motion for an Order Approving Permission to Appeal from an Interlocutory Order Pursuant to Idaho Appellate Rule 12.

## **1. Introduction**

The City's request for an order approving a permissive appeal fails to meet the criteria of Idaho Appellate Rule 12. First, the legal issue implicated by the City's Motion to Dismiss is not one of first impression. On the contrary, the City's Motion involved a straightforward application of existing law. There are no substantial grounds for differing opinions on this legal issue. Second, the notice provisions of I.C. § 50-219 and the Idaho Tort Claims Act (ITCA) do not control the outcome of this case. Allowing an appeal now would not "materially advance the orderly resolution of the litigation," but would lead to piece-meal litigation as a second appeal would certainly occur. If Petra successfully defends the City's claims at trial and prevails on its counterclaims, the City will have the opportunity to appeal the Court's decision regarding the ITCA. And most fundamentally, the Court correctly found that Petra complied with I.C. § 50-219 and the notice provisions of the ITCA. The City was fully apprised of Petra's claims within 180 days of their accrual.

In short, the City's Motion is unsupported by the plain language of I.A.R. 12 and the relevant case law. The Court correctly held that Petra complied with I.C. § 50-219 and the ITCA. Petra requests that the Court enter an order denying the City's Motion.

## **2. Background**

This case arises out of work Petra performed as the construction manager on the development and construction of the Meridian City Hall and the City's failure to pay Petra all of the money to which it is entitled. The City hired Petra as the construction manager not-at-risk in August of 2006, representing to Petra that the maximum price of the project was \$12,200,000.

By April 2008, Meridian had substantially expanded the original project to a 104,000 square foot LEED-certified three-story building with a full basement ("Project"). The City signed prime contracts and issued purchase and work orders for the Project totaling more than \$21,700,000.

As a result of the significant changes to the Original Project, including, but not limited to an increase in size by 30%, enhancement of quality and complexity, Owner's schedule (i.e., fast-track construction), and increased cost, Petra's work as the construction manager was substantially increased. As a result, Petra is entitled to an equitable adjustment of the construction management fee ("CM fee"). The original CM fee was fixed at \$574,000 (4.7% of the \$12.2 million project budget). By its Change Order No. 2, Petra seeks an additional CM fee of \$386,392 under Section 7 of the Construction Management Agreement ("CMA"), and \$136,197 in additional reimbursable expenses under Section 6.2.2 of the CMA.

Rather than address the substance of the issue, the City seeks to dismiss Petra's counterclaim for an equitable adjustment in its CM fee based on lack of notice. One month after brushing aside Petra's initial request for mediation of the claim, and two months after denying Petra's request for an equitable adjustment of its CM fee, the City sued Petra. Sixteen months after filing the lawsuit, the City initiated its argument that it never received timely notice of Petra's claims. The Court correctly denied the City's Motion to Dismiss under the ITCA. The City's Motion for Summary Judgment, premised on a similar argument, remains under advisement.



### **3. Law and Argument**

#### **3.1 The City's request for an order approving an interlocutory appeal does not satisfy the requirements of Idaho Appellate Rule 12 and should be denied.**

The City's request for an order approving permission to appeal this Court's denial of its Motion to Dismiss (ITCA) fails to meet the criteria of Idaho Appellate Rule 12. A permissive appeal may be accepted from an interlocutory order or judgment of the district court if it "involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation." I.A.R. 12. Permissive appeals are only accepted by the Supreme Court in the "most exceptional cases." *Aardema v. U.S. Dairy Systems, Inc.*, 147 Idaho 785, 789, 215 P.3d 505, 509 (2009) (accepting a permissive appeal because of "confusion regarding the economic loss rule"). The Supreme Court accepts permissive appeals with the "intent to resolve 'substantial legal issues of great public interest or legal issues of first impression.'" *Id.* (quoting *Budell v. Todd*, 105 Idaho 2, 4, 665 P.2d 701, 703 (1983)).

First, as further explained below, this Court's holding is consistent with well-established Idaho law addressing substantial compliance with the notice provisions of the ITCA. *See Cox v. City of Sandpoint*, 140 Idaho 127, 131, 90 P.3d 352, 356 (2003). Contrary to the City's argument, this is not a case of first impression or one involving a "substantial legal issue of great public interest." In fact, the City is attempting to have it both ways. On the one hand, the City argues this Court "disregarded Idaho case law on point and the plain language of the ITCA

supporting the opposite conclusion.”<sup>1</sup> In the very next sentence, the City states “an immediate appeal would also satisfy one of the intents of Rule 12 because the Idaho Supreme Court has not yet addressed whether notice to a city attorney satisfies the notice requirements of the ITCA.”<sup>2</sup> Besides being inconsistent, the City is incorrect. Every case has different facts. That does not make each case one of first impression. The Court’s ruling was a straightforward application of existing case law.<sup>3</sup> There are dozens of cases discussing compliance with the notice requirements of the ITCA. The parties here obviously hold differing opinions on the issue, as is true in every case. But I.A.R. 12 is reserved for the “most exceptional cases.” *Aardema*, 147 Idaho at 789, 215 P.3d at 509. Under the City’s reasoning, almost every interlocutory order would be appealable.

Second, *Budell v. Todd* is dispositive. 105 Idaho 2, 665 P.2d 701 (1983). Under the reasoning of *Budell*, the City’s request for an interlocutory appeal in this case should not be approved as it would not “advance the orderly resolution of the litigation.” I.A.R. 12. Under *Budell*, one factor in accepting a permissive appeal under I.A.R. 12 is the “likelihood or possibility of another appeal after judgment is entered by the district court.” 105 Idaho at 4, 665 P.2d at 703. In *Budell*, the Court rejected a permissive appeal due in part to the possibility the case would come before it again on appeal. *Id.*

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<sup>1</sup> Memorandum in Support of Plaintiff’s Motion for Order Approving Permission to Appeal from an Interlocutory Order Pursuant to Idaho Appellate Rule 12, at 4.

<sup>2</sup> *Id.*

<sup>3</sup> Petra made a number of alternative arguments in addition to its primary argument that the March 16, 2009 letter complied with the ITCA and that the claim accrued when the City denied Petra’s Change Order. These arguments include that Petra’s claims are equitable in nature and not damage claims and that the notice provisions of the ITCA should not apply to counterclaims. Petra understands the Court’s ruling as being grounded in the finding that Petra complied with the ITCA.

Here, if the Supreme Court hears the requested interlocutory appeal and affirms this Court's ruling, the case will remain on for trial, after which another appeal is highly likely. And, in the unlikely event the Supreme Court accepts the appeal and reverses this Court, the ruling would not terminate the case. The City's claims would remain alive and Petra intends to vigorously defend the case at trial. No matter who prevails at trial, the likelihood of another appeal in this case is extremely high. Furthermore, as the case stands today, if Petra successfully defends against the City's claims at trial and prevails on its counterclaims, the City will have the opportunity to appeal the Court's decision on the applicability of the ITCA. In sum, an appeal at this juncture will accomplish the exact opposite of "advanc[ing] the orderly resolution of the litigation" and would result in piece-meal litigation, a result the Supreme Court has repeatedly rejected in varying contexts. *See e.g., Losser v. Bradstreet*, 145 Idaho 670, 674, 183 P.3d 758, 762 (2008); *Mortimer v. Rivera Apartments*, 122 Idaho 839, 842, 840 P.2d 383, 386 (1992); *Long v. Goodyear Tire Rubber Co.*, 100 Idaho 183, 184, 595 P.2d 717, 718 (1979). Additionally, a permissive appeal will almost certainly increase the litigation costs of both parties and create an even greater burden on the courts.

Therefore, because the City has failed to meet the criteria of I.A.R. 12, the Court should enter an order disapproving of a permissive appeal.

**3.2 The Court correctly held that Petra's claim accrued when the City denied Petra's request for an equitable adjustment in its CM fee.**

The City continues to demonstrate its flawed understanding of I.C. § 50-219 and the ITCA by confusing the meaning of "claim" under the statute. Petra submits there are no

substantial grounds for a difference of opinion on this legal issue. The notice requirement of the ITCA is intended to give pre-litigation notice to governmental entities. *See Cox v. City of Sandpoint*, 140 Idaho 127, 131-32, 90 P.3d 352, 356-57 (2003). The notice requirements of the ITCA exist in order to promote resolution of **disputes** without “needless expense and litigation.” *Pounds v. Denison*, 120 Idaho 425, 426, 816 P.2d 982 (1991). The “180-day notice period begins to run at the occurrence of a **wrongful act**, even if the extent of damages is not known or is unpredictable at the time.” *Magnuson Properties Partnership v. City of Coeur d’Alene*, 138 Idaho 166, 169, 59 P.3d 971, 974 (2002) (emphasis added).

The notice provisions of the ITCA do not govern the normal operation of contract provisions like the equitable adjustment term found in Section 7 of the CMA or a routine change order in the construction context. Simply requesting a party to perform its contractual obligations does not trigger the 180-day notice requirement. For example, if the City’s position were correct, every contractor working on a project for a municipality would have to file a formal notice of claim alongside every change order. Anticipating and asserting a potential legal “claim” for breach of contract at every turn is not the policy goal I.C. § 50-219 and the ITCA were intended to implement. The City’s continuing and repeated attempt to conflate a change order with an ITCA “claim” is wrong.

The facts of *Magnuson Properties Partnership v. City of Coeur d’Alene*, 138 Idaho 166, 59 P.3d 971 (2002), demonstrate the City’s flawed reasoning. In *Magnuson*, the plaintiff, a developer, alleged the defendant City agreed to reimburse the plaintiff for the cost of extending a sewer line. 138 Idaho at 168, 59 P.3d at 973. After the oral contract was allegedly made, the

plaintiff ordered a contractor to do the work. *Id.* On May 10, 1996 the plaintiff's contractor submitted its costs to the plaintiff, who then turned to the City for reimbursement under the terms of the alleged oral agreement. *Id.* In a letter dated August 13, 1996, the City denied the request for reimbursement and denied the existence of the oral contract. *Id.* The plaintiff then filed a notice of claim on February 18, 1997 and filed suit nearly two years later. *Id.*

The Idaho Supreme Court considered the date the claim accrued to be the date the plaintiff received the letter, August 15, 1996, 189 days before he filed his notice of claim. *Id.* at 170, 59 P.3d at 974. The Court stated "As of August 15, 1996, a reasonable and prudent person would have knowledge of facts of a **wrongful act, i.e., the City's denial of and/or breach of the alleged contract.** Therefore, the 180-day notice period began on August 15, 1996, and Magnuson failed to provide timely notice of its claim." *Id.* (emphasis added).

Under the City's reasoning, the plaintiff in *Magnuson* should have filed a notice of claim immediately upon ordering the sewer extension work. At that time, the plaintiff would certainly have known that he would eventually seek reimbursement from the City at some future date. The folly of this approach is apparent. The ITCA only applies in the context of disputes. It does not apply when parties are simply acting under the terms of a contract and seeking the performance of contractual obligations. When the City in *Magnuson* denied the plaintiff's request for reimbursement, the claim accrued. The same result adheres in this case. This Court correctly held Petra's claim accrued no sooner than February 24, 2009. That was when the City denied Petra's requests for an equitable adjustment in its CM fee and for additional reimbursables. That was the wrongful act in this case – the breach of contract.

Additionally, the City's own conduct during the construction of the Project demonstrates the defect in its argument. To give just one example, on September 5, 2007, during project construction, Wes Bettis of Petra emailed Keith Watts, the City authorized representative, about Petra's intent to seek a CM fee increase.<sup>4</sup> Bettis wrote:

Any thought on a meeting for the Change Order Request for the CM fee on the Contaminated Soils? **I have an informal COR [change order request] for you to review on the change in the project complexity from a \$12.2 million 80,000 SF to a \$19.9 Million 100000 SF project**, but thought I would hold off formal submittal until the Plaza is bid and the final base contract value is determined so that everything stays current and we do not create an image of 'nickel and dime-ing' the project.<sup>5</sup>

Keith Watts responded "Good idea on the 2nd one" referring to Change Order No. 2.<sup>6</sup> This email not only demonstrates the parties' course of conduct in dealing with Petra's CM fee,<sup>7</sup> it shows how these things are viewed in the construction world. Although the City's litigation position is that an ITCA notice of claim should have been filed the moment the project appeared to be growing in size and complexity, this is belied by the parties own conduct. In the above email, the City's authorized representative encourages Petra to hold off on formally requesting an adjustment in its CM fee. This email exchange shows that a change order is not a "claim" under the ITCA.<sup>8</sup> A change order for an equitable adjustment is a contractual mechanism to

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<sup>4</sup> Affidavit of Thomas G. Walker, dated October 21, 2010, filed in support of *Petra's Opposition to the City's Motion for Order Approving Permission to Appeal from an Interlocutory Order Pursuant to Idaho Appellate Rule 12*, at Exh. A.

<sup>5</sup> *Id.* (emphasis added).

<sup>6</sup> *Id.*

<sup>7</sup> Petra submits this email demonstrates the inherent flaws in the City's Motion for Summary Judgment regarding lack of notice under the CMA.

<sup>8</sup> It also demonstrates that Petra complied with the CMA in its handling of Change Order No. 2, fully disclosed its intent to seek a CM fee increase, and in fact acted at the City's direction in handling its request. The email exchange

address Petra's entitlement to additional money. As the Court correctly held, a change order does not become a claim under the ITCA unless and until it is denied in breach of the CMA.

Lastly, contrary to the City's repeated claims, the record is clear that Petra disclosed its intent to seek an equitable adjustment at the appropriate time and consistent with its contractual obligations. It was perfectly reasonable for Petra to wait until August, 2007 to list its CM fee request in a cost estimate or budget because, as Gene Bennett details in his affidavit, it was not until "late August 2007 that the scope of the Project was developed to the point where the total impact of the changes in the project scope could start to be assessed."<sup>9</sup> It was not until late August 2007 that many of the elements of project became known, including the extent of the remediation of contaminated materials and unsuitable soils.<sup>10</sup> Petra disclosed the CM fee request before performing the additional services.<sup>11</sup> Consequently, it was in late August and early September that Petra raised the fact that the scope of the Project had changed considerably from that contemplated in the CMA.<sup>12</sup> Notably, when Wes Bettis of Petra indicated this in the above email to the City's authorized representative, Keith Watts did not express any disagreement.

### **3.3 The Court correctly held that Petra complied with I.C. § 50-219 and the notice provisions of the ITCA.**

This Court's holding is consistent with Idaho law on compliance with I.C. § 50-219 and the notice provisions of the ITCA. Contrary to the City's argument, this is not a case of first

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also shows why the City should be estopped in asserting Petra's CM fee request was untimely and contradicts the City's claims that it was somehow blind-sided or deceived by Petra.

<sup>9</sup> Affidavit of Eugene R. Bennett, dated September 13, 2010, filed support of *Petra's Opposition to the City of Meridian's Motion for Leave to Amend to Add a Claim for Punitive Damages*, at ¶ 106.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at ¶ 113.

<sup>12</sup> *Id.* at ¶ 106.

impression or one involving a novel issue of law. Here, Petra sent the letter to the City through its counsel because the City was represented by counsel and because the City requested that communications be handled that way. This letter more than sufficed to give notice of Petra's counterclaim. *See Cox*, 140 Idaho at 132, 90 P.3d at 357; *see also Smith v. City of Preston*, 99 Idaho 618, 621, 586 P.2d 1062, 1065 (1978). Placing form over substance, and entertaining the fiction that the City was unaware of Petra's claim, is directly contrary to the cases interpreting the ITCA. *See, e.g., Smith*, 99 Idaho at 621-22, 586 P.2d at 1065-66.

Contrary to the City's position that this "Court disregarded Idaho case law on point and the plain language of the ITCA supporting the opposite conclusion," it is the City that fails to cite the relevant standard. The ITCA states: "A claim filed under the provisions of this section shall not be held invalid or insufficient by reason of an inaccuracy in stating the time, place, nature or cause of the claim, or otherwise, unless it is show that the governmental entity *was in fact misled to its injury thereby*." I.C. § 6-907 (emphasis added); *see Cox*, 140 Idaho at 132, 90 P.3d at 357 (citing *Smith*, 99 Idaho at 621, 586 P.2d at 1065)). Further, the Supreme Court has stated its policy is to "take a liberal approach to interpreting the notice requirement of the Idaho Tort Claims Act." *Farber v. State*, 102 Idaho 398, 630 P.2d 685, 689 (1981).

The City has not presented any evidence that it was "misled to its injury." In fact, such evidence does not exist, as the City sued Petra *after* being presented with a request to mediate the denial of Petra's CM fee request. The City was on notice of Petra's claim before *the City* initiated litigation. This Court correctly held that Petra's March 16, 2009 letter complied with the notice requirements of the ITCA.



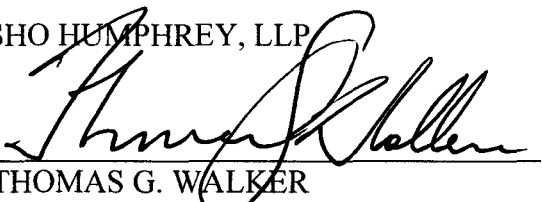
#### 4. Conclusion

The City's request for an order approving a permissive appeal fails to meet the criteria of Idaho Appellate Rule 12. The City's request does not involve "substantial legal issues of great public interest or legal questions of first impression." *Aardema*, 147 Idaho at 789, 215 P.3d 505, 509 (2009). Neither does resolution of the ITCA issue control the outcome of the case as a whole. A permissive appeal at this juncture, when the case is set for an imminent trial, would create piecemeal litigation, increase litigation costs, and burden both the trial court and the appellate court. Most importantly, this Court's denial of the City's Motion to Dismiss was correct.

DATED: October 21, 2010

COSHO HUMPHREY, LLP

By:

  
THOMAS G. WALKER

Attorney for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21<sup>th</sup> day of October, 2010, a true and correct copy of the  
within and foregoing document was served upon:

Kim J. Trout, Esq.  
Daniel Loras Glynn  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☐ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☒ Facsimile: 331-1529  
☐ E-mail:

  
THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 3:37

OCT 21 2010

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB No. 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
COSH O HUMPHREY, LLP  
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[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**PETRA INCORPORATED'S  
SUPPLEMENTAL DISCLOSURE OF  
EXPERT WITNESS INFORMATION**

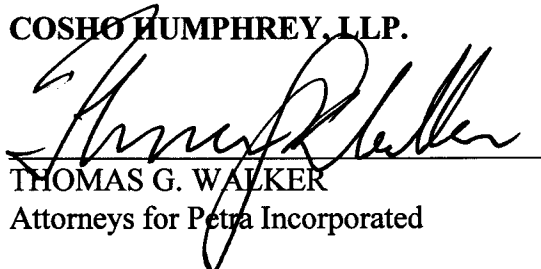
Petra Incorporated ("Petra"), by and through its attorney of record, Thomas G. Walker and pursuant to the Order Setting Trial and Other Deadlines and Rule 26(b)(4) of the Idaho Rules of Civil Procedure, hereby supplemental its Disclosure of Experts dated August 12, 2010 as follows:

Keith Pinkerton/Hooper Cornell, PLLC. A complete statement of all opinions to be expressed. Attached hereto is a true, correct and complete Preliminary Report dated

October 19, 2010, Bates numbered Petra97106 through Petra97128.

DATED: October 21, 2010.

**COSHUMPHREY, LLP.**

A handwritten signature in black ink, appearing to read "Thomas G. Walker", is written over a horizontal line.

THOMAS G. WALKER

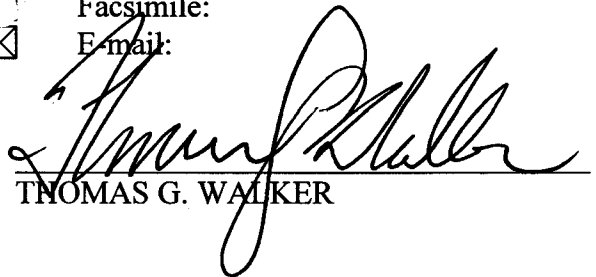
Attorneys for Petra Incorporated

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 21<sup>st</sup> day of October, 2010 a true and correct copy of  
the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☐ Facsimile:  
☒ E-mail:

  
THOMAS G. WALKER

# **PRELIMINARY EXPERT WITNESS REPORT**

**City of Meridian**

**v.**

**Petra, Inc.**

**Prepared by:**

Hooper Cornell, PLLC  
250 Bobwhite Court, Suite 300  
Boise, Idaho 83706

**Prepared for:**

Cosho Humphrey LLP

October 19, 2010



**HOOPER CORNELL**

006687  
PETRA97106

October 20, 2010

Mr. Thomas G. Walker, Esq.  
Cosho Humphrey, LLP  
800 Park Blvd., Suite 790  
PO Box 9518  
Boise, ID 83707-9518

RE: City of Meridian v. Petra, Inc.

Dear Mr. Walker:

At your request, I have reviewed the facts and circumstances surrounding the counterclaim asserted by Petra, Inc., (Petra) in the matter cited above to quantify corresponding economic damages. This report is intended to summarize the analyses performed and illustrate the conclusions reached.

In performing this assignment, I assumed that Petra will prevail in its legal theories of this case. Accordingly, this report should not be construed to contain any opinions with regard to Defendant's liability.

#### **Data Considered**

During the course of this engagement, I reviewed relevant data obtained from the following sources: (1) building permit data from all of the incorporated entities in Ada and Canyon counties except for the municipalities of Notus and Greenleaf; (2) audited financial statements of Petra, Inc.; and (3) various legal filings associated with this case. In addition, I have had discussions with management of Petra and its advisors.

#### **Methodology**

To quantify damages, I used available data to estimate the magnitude of the nonresidential construction market in Ada and Canyon counties. I then coupled this information with data obtained from Petra to estimate its share of that market by year from 2003 forward. By comparing Petra's results in the marketplace both before and after the alleged wrongful acts of the City of Meridian, I was able to estimate the present value of lost profits incurred by Petra, Inc.

I also constructed a parallel analysis using the same input data and applying a technique known as Monte Carlo Simulation. This technique provides an alternative method of eliminating uncertainty through the use of statistics.

Both methods of analysis produce similar results and were designed to quantify damages with a reasonable degree of economic certainty; all of my conclusions are expressed on that basis.

**Professional Qualifications**

A listing of my professional qualifications and prior testimony are attached to this report.

**Professional Billing Rates**

Hooper Cornell's hourly rates currently range from \$60 per hour for clerical staff to \$300 per hour for senior partners. My personal billing rate in effect for this assignment is \$285 per hour.

**Conclusions**

Based on the methods described above and as shown in additional detail on the accompanying schedules, it is my opinion that the present value of the economic damages incurred by Petra is between **\$3.9 million** and **\$4.2 million**.

Sincerely,

A handwritten signature in black ink, appearing to read "Keith A. Pinkerton", with a stylized flourish at the end.

Keith A. Pinkerton  
Director of Valuation Services



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## Schedules

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## City of Meridian v. Petra Inc.

## Schedule 1

## Building Permit Data

All Permits	2004	2005	2006	2007	2008	2009	06/30/10
Ada County	\$276,717,503	\$396,314,708	\$314,126,706	\$251,938,333	\$133,067,072	\$145,374,737	\$24,675,686
Boise	\$335,082,510	\$498,018,247	\$494,886,270	\$541,190,848	\$332,881,239	\$213,843,043	\$95,489,621
Eagle	\$174,605,084	\$202,219,100	\$126,409,103	\$75,805,586	\$52,420,410	\$14,018,085	\$23,591,918
Garden City	\$20,419,437	\$18,389,338	\$27,982,000	\$32,122,780	\$18,174,358	\$5,881,271	\$3,998,425
Meridian	\$559,803,356	\$750,775,839	\$531,412,665	\$334,846,565	\$285,537,421	\$203,540,987	\$94,572,939
Kuna	\$36,283,523	\$97,258,749	\$73,133,477	\$53,298,816	\$56,987,461	\$42,602,653	\$21,336,571
Star	\$210,097	\$86,673,420	\$81,164,266	\$35,155,732	\$12,232,914	\$5,339,201	\$12,883,267
Canyon County	\$114,862,336	\$148,883,412	\$128,435,850	\$86,675,060	\$37,820,892	\$36,431,143	\$10,005,160
Caldwell	\$106,269,332	\$172,161,313	\$183,493,482	\$138,842,255	\$101,420,462	\$44,506,661	\$27,738,585
Nampa	\$208,000,000	\$305,000,000	\$334,000,000	\$161,000,000	\$100,000,000	\$46,000,000	\$28,489,218
Notus							
Greenleaf							
Parma	\$1,828,065	\$5,998,269	\$1,439,322	\$3,355,955	\$1,447,148	\$1,381,559	
Melba	\$100,768	\$548,177	\$202,644	\$645,847	\$252,730	\$52,096	
Middleton	\$11,911,908	\$31,990,506	\$40,612,129	\$24,864,565	\$20,308,746	\$47,774,268	\$7,010,217
Wilder	\$314,212	\$2,719,914	\$3,379,639	\$1,608,794	\$408,065	\$4,657,960	\$1,222,800
<b>Total</b>	<b>\$1,846,408,131</b>	<b>\$2,716,950,991</b>	<b>\$2,340,677,553</b>	<b>\$1,741,351,136</b>	<b>\$1,152,958,918</b>	<b>\$811,403,664</b>	<b>\$351,014,407</b>

Residential Permits	2004	2005	2006	2007	2008	2009	6/30/2010
Ada County	\$233,623,863	\$316,769,821	\$258,819,048	\$157,358,634	\$86,642,101	\$45,117,752	\$20,073,287
Boise	\$128,056,970	\$196,539,590	\$183,497,989	\$166,108,388	\$50,331,483	\$30,539,736	\$32,323,477
Eagle	\$157,589,353	\$181,206,711	\$92,361,699	\$39,668,128	\$29,413,624	\$12,583,499	\$16,501,717
Garden City	\$0	\$11,660,490	\$13,435,553	\$21,306,321	\$11,413,162	\$753,007	\$1,933,300
Meridian	\$455,091,820	\$616,965,501	\$344,223,861	\$198,490,581	\$150,559,837	\$129,177,240	\$72,302,915
Kuna	\$31,796,898	\$87,800,540	\$63,598,738	\$45,204,132	\$46,421,396	\$42,770,063	\$14,342,552
Star	\$24,732,762	\$97,237,278	\$55,848,275	\$29,132,926	\$5,718,489	\$4,272,103	\$7,683,297
Canyon County	\$90,306,221	\$121,002,724	\$106,846,644	\$52,869,413	\$20,442,712	\$9,949,862	\$4,185,211
Caldwell	\$70,068,467	\$122,477,528	\$142,558,825	\$96,400,983	\$27,239,141	\$23,695,249	\$12,878,350
Nampa	\$161,238,871	\$201,369,462	\$188,508,219	\$48,068,051	\$27,700,866	\$8,515,212	\$6,670,091
Notus							
Greenleaf							
Parma	\$134,256	\$1,350,000	\$840,000	\$2,553,000	\$494,732	\$342,616	\$152,778
Melba	\$0	\$552,165	\$186,000	\$440,763	\$201,906	\$0	\$0
Middleton	\$13,151,362	\$25,324,336	\$36,215,791	\$11,500,213	\$16,288,418	\$6,834,632	\$5,221,523
Wilder	\$0	\$0	\$0	\$1,324,397	\$371,664	\$138,502	\$0
<b>Total</b>	<b>\$1,365,790,843</b>	<b>\$1,980,256,146</b>	<b>\$1,486,940,642</b>	<b>\$870,425,930</b>	<b>\$473,239,531</b>	<b>\$314,689,473</b>	<b>\$194,268,498</b>

Non-Residential	2004	2005	2006	2007	2008	2009	6/30/2010
Ada County	\$43,093,640	\$79,544,887	\$55,307,658	\$94,579,699	\$46,424,971	\$100,256,985	\$4,602,399
Boise	\$207,025,540	\$301,478,657	\$311,388,281	\$375,082,460	\$282,549,756	\$183,303,307	\$63,166,144
Eagle	\$17,015,731	\$21,012,389	\$34,047,404	\$36,137,458	\$23,006,786	\$1,434,586	\$7,090,201
Garden City	\$20,419,437	\$6,728,848	\$14,546,447	\$10,816,459	\$6,761,196	\$5,128,264	\$2,065,125
Meridian	\$104,711,536	\$133,810,338	\$187,188,804	\$136,355,984	\$134,977,584	\$74,363,747	\$22,270,024
Kuna	\$4,486,625	\$9,458,209	\$9,534,739	\$8,094,684	\$10,566,065		\$6,994,019
Star			\$25,315,991	\$6,022,806	\$6,514,425	\$1,067,098	\$5,199,970
Canyon County	\$24,556,115	\$27,880,688	\$21,589,206	\$33,805,647	\$17,378,180	\$26,481,281	\$5,819,949
Caldwell	\$36,200,865	\$49,683,785	\$40,934,657	\$42,441,272	\$74,181,321	\$20,811,412	\$14,860,235
Nampa	\$46,761,129	\$103,630,538	\$145,491,781	\$112,931,949	\$72,299,134	\$37,484,788	\$21,819,127
Notus							
Greenleaf							
Parma	\$1,693,809	\$4,648,269	\$599,322	\$802,955	\$952,416	\$1,038,943	
Melba	\$100,768		\$16,644	\$205,084	\$50,824	\$52,096	
Middleton		\$6,666,170	\$4,396,338	\$13,364,352	\$4,020,328	\$40,939,636	\$1,788,694
Wilder	\$314,212	\$2,719,914	\$3,379,639	\$284,397	\$36,401	\$4,519,458	\$1,222,800
<b>Total</b>	<b>\$506,379,407</b>	<b>\$747,262,691</b>	<b>\$853,736,911</b>	<b>\$870,925,206</b>	<b>\$679,719,387</b>	<b>\$496,881,601</b>	<b>\$156,898,687</b>

006691

**City of Meridian v. Petra Inc.**  
**Historical Financial Information**

	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>2007</u>	<u>2008</u>	<u>2009</u>
Petra Revenue	\$33,059,273	\$47,716,714	\$80,619,217	\$53,205,160	\$50,711,114	\$33,421,638
Other Income	\$4,854	\$8,246	\$7,317	\$30,707	\$23,675	\$4,347
Total Revenue	\$33,064,127	\$47,724,960	\$80,626,534	\$53,235,867	\$50,734,789	\$33,425,985
Direct Costs	\$30,608,998	\$44,857,218	\$76,375,119	\$49,858,440	\$45,981,569	\$30,712,921
Gross Profit	\$2,455,129	\$2,867,742	\$4,251,415	\$3,377,427	\$4,753,220	\$2,713,064
Incremental Costs						
Payroll	\$632,656	\$787,527	\$961,079	\$1,177,545	\$1,234,425	\$803,831
Bad Debt Expense	\$0	\$0	\$0	\$0	\$867,946	\$171,522
Repairs and Maintenance	\$29,548	\$28,142	\$110,878	\$186,930	\$196,051	\$123,843
Travel and Lodging	\$8,055	\$21,061	\$10,606	\$45,006	\$11,437	\$30,638
Auto Expense	\$27,477	\$18,655	\$15,448	\$38,080	\$20,586	\$8,243
Entertainment	\$7,578	\$9,684	\$8,461	\$9,486	\$11,437	\$8,151
Total Incremental Costs	\$705,314	\$865,069	\$1,106,472	\$1,457,046	\$2,341,881	\$1,146,227
Net Incremental Earnings	\$1,749,815	\$2,002,673	\$3,144,943	\$1,920,381	\$2,411,339	\$1,566,837
Incremental Margin	5.29%	4.20%	3.90%	3.61%	4.76%	4.69%
CM Margin	4.07%	2.92%	2.97%	4.08%	4.37%	4.78%

006692

City of Meridian v. Petra Inc.  
Estimation of Petra Market Share

Schedule 3

		Contract Revenue	Construction Mgmt		
Period	Non-Residential Construction Activity		CM Revenue	CM Cost Not Thru Petra GL	Total CM
2004	\$506,379,407				
2005	\$747,262,691	\$29,121,816	\$5,346,171	\$4,688	\$5,350,859
2006	\$853,736,911	\$47,471,859	\$9,315,265	\$0	\$9,315,265
2007	\$870,925,206	\$31,281,028	\$1,891,747	\$6,675,516	\$8,567,263
2008	\$679,719,387	\$32,472,819	\$1,473,422	\$12,114,577	\$13,587,999
2009	\$496,881,601	\$17,044,396	\$111,484	\$340,206	\$451,690
06/30/10	\$156,898,687				
08/31/10	\$209,198,250	\$6,912,696	\$0	\$115,131	\$115,131
2010*	\$313,797,374	\$10,369,044	\$0	\$172,696	\$172,696
		Market			Market
1-Year Lag		Share			Share
2005	\$506,379,407	\$29,121,816		\$5,350,859	1.1%
2006	\$747,262,691	\$47,471,859		\$9,315,265	1.2%
2007	\$853,736,911	\$31,281,028		\$8,567,263	1.0%
2008	\$870,925,206	\$32,472,819		\$13,587,999	1.6%
2009	\$679,719,387	\$17,044,396		\$451,690	0.1%
2010	\$496,881,601	\$10,369,044		\$172,696	0.0%
6-Mo Lag					
2005	\$626,821,049	\$29,121,816		\$5,350,859	0.9%
2006	\$800,499,801	\$47,471,859		\$9,315,265	1.2%
2007	\$862,331,058	\$31,281,028		\$8,567,263	1.0%
2008	\$775,322,297	\$32,472,819		\$13,587,999	1.8%
2009	\$588,300,494	\$17,044,396		\$451,690	0.1%
2010	\$405,339,488	\$10,369,044		\$172,696	0.0%

\*Annualized

006693

City of Meridian v. Petra Inc.  
Estimation of Lost Market Share

Contract Projects				
1-Year Lag				
Petra Market Share	4-Year Average	3-Year Average	2-Year Average	
5.75%				
6.35%			6.1%	
3.66%		5.26%		
3.73%	4.87%			
2.51%				
2.09%				
Average Less Current	2.79%	3.17%	3.97%	

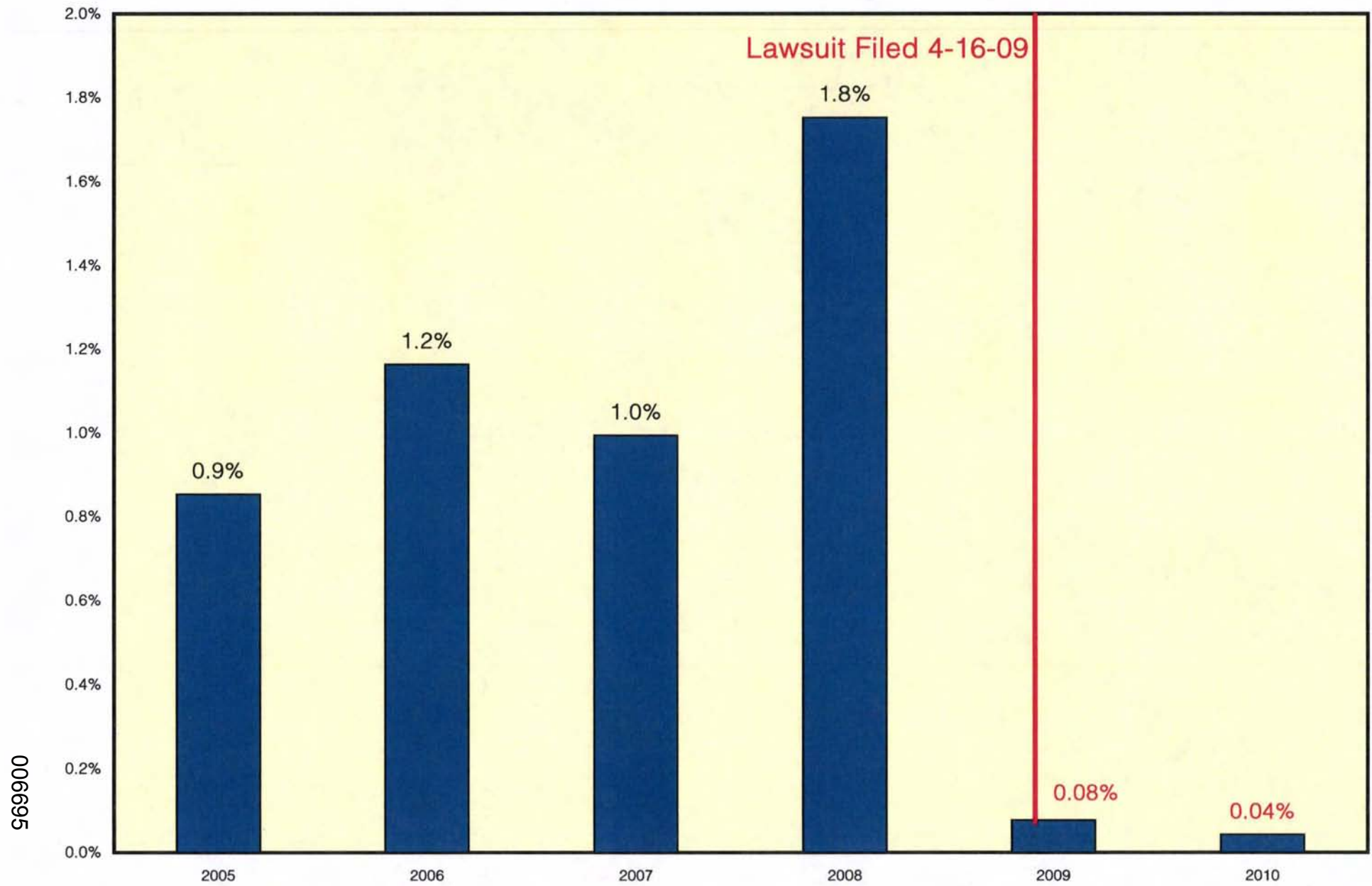
6-Month Lag				
Petra Market Share	4-Year Average	3-Year Average	2-Year Average	
4.65%				
5.93%			5.3%	
3.63%		4.73%		
4.19%	4.60%			
2.90%				
2.56%				
Average Less Current	2.04%	2.18%	2.73%	
Minimum Lost Share	<u>2.00%</u>			

Construction Management				
1-Year Lag				
Petra Market Share	4-Year Average	3-Year Average	2-Year Average	
1.06%				
1.25%			1.2%	
1.00%		1.10%		
1.56%	1.22%			
0.07%				
0.03%				
	1.18%	1.07%	1.12%	

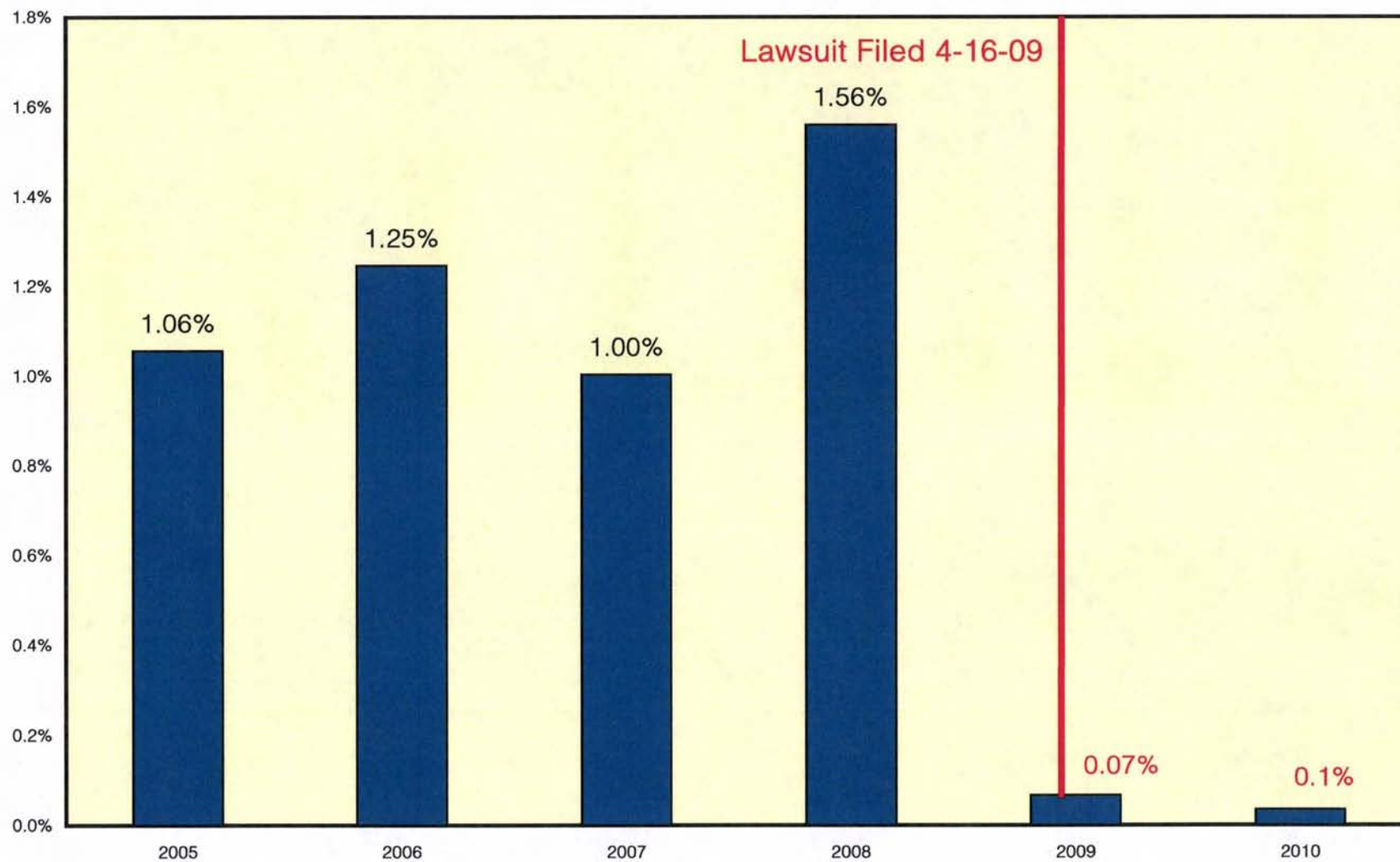
6-Month Lag				
Petra Market Share	4-Year Average	3-Year Average	2-Year Average	
0.85%				
1.16%			1.0%	
0.99%		1.00%		
1.75%	1.19%			
0.08%				
0.04%				
	1.15%	0.96%	0.97%	
	<u>1.00%</u>			

006694

Historical Petra "Market Share" of Construction  
Management Revenue in Ada & Canyon Counties with a 6-Month Lag

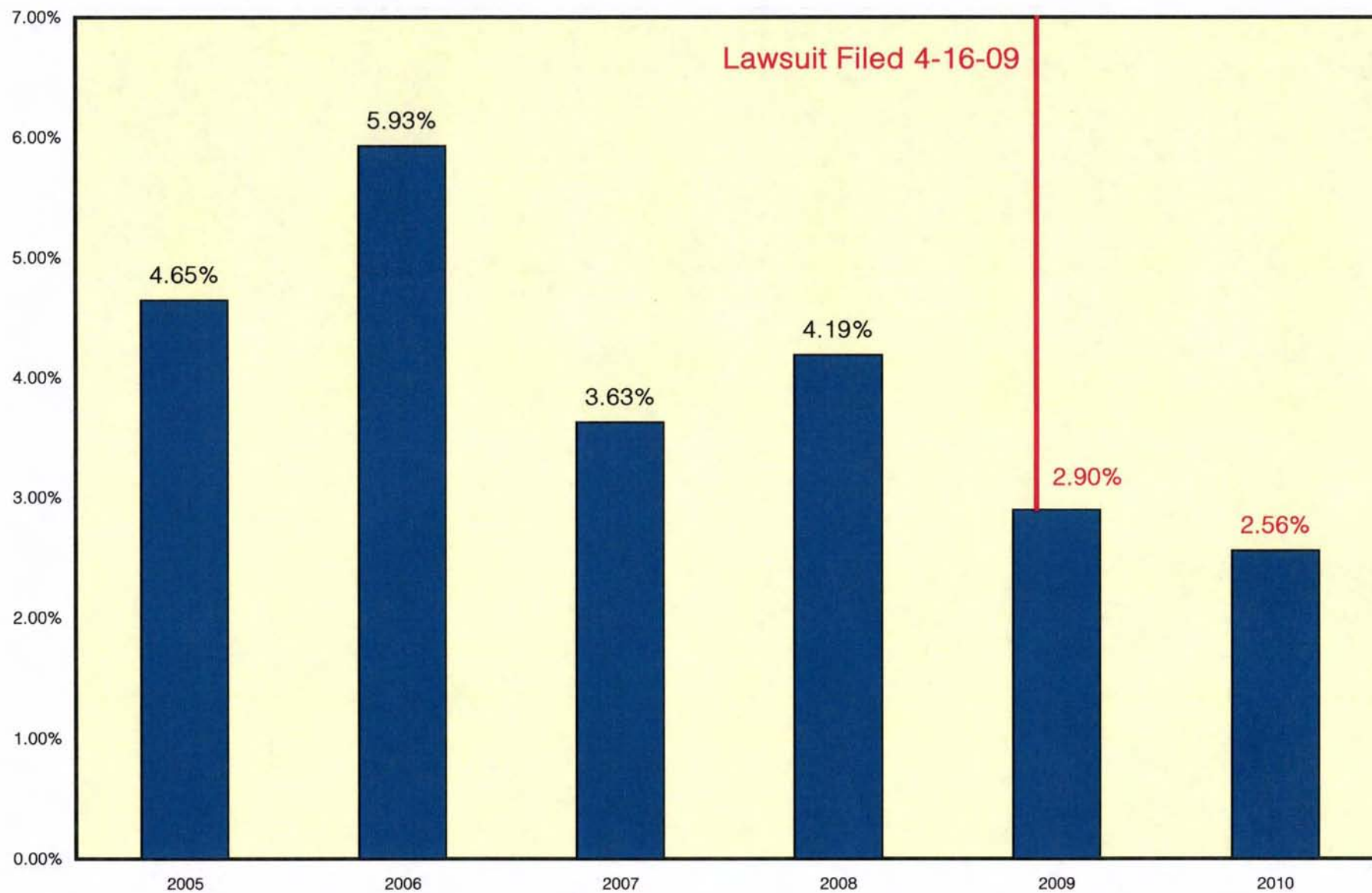


Historical Petra "Market Share" of Construction  
Management Revenue in Ada & Canyon Counties with a 1-Year Lag



969900

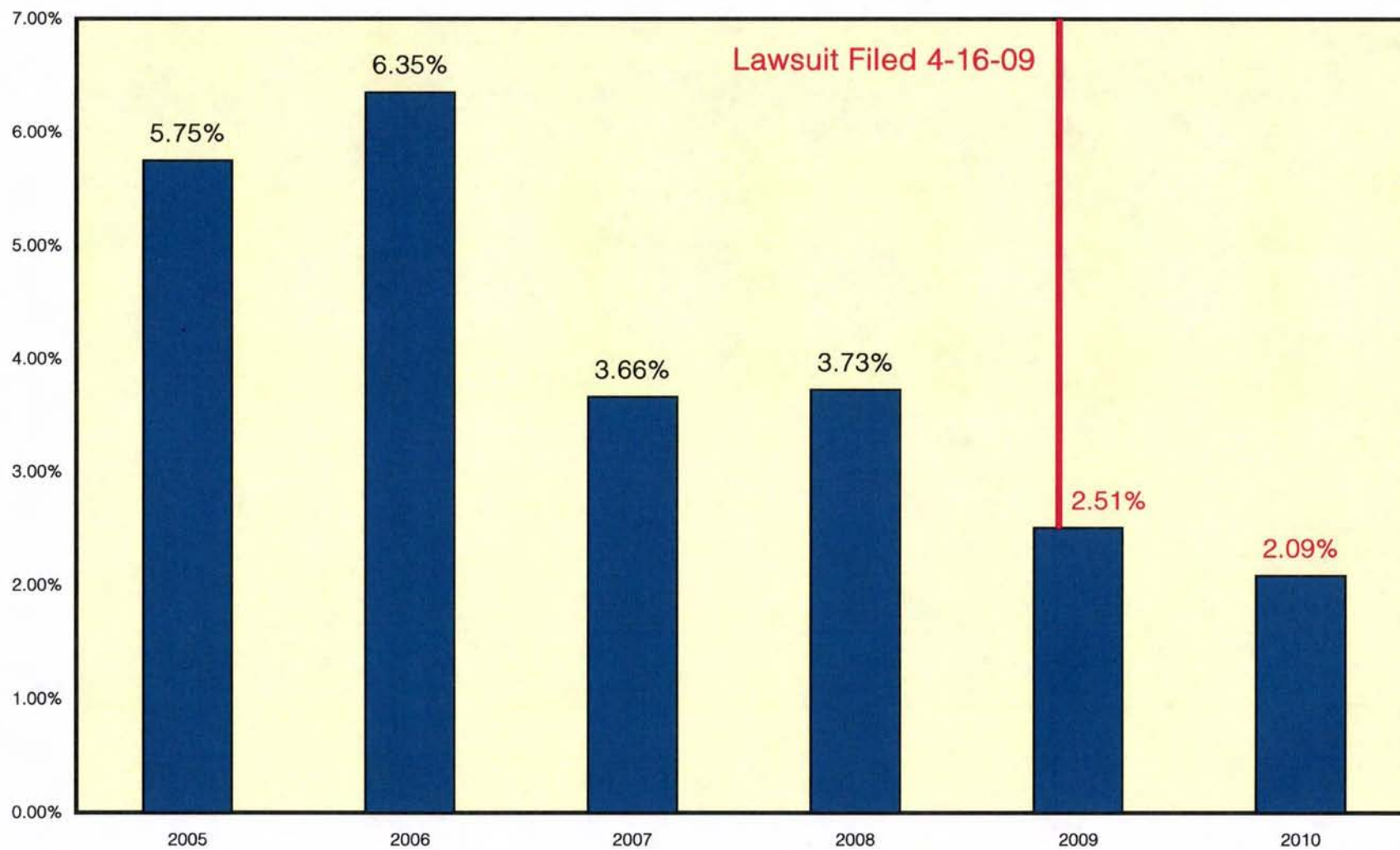
Historical Petra "Market Share" of Contract Revenue  
in Ada & Canyon Counties with a 6-Month Lag



006697



Historical Petra "Market Share" of Contract Revenue  
in Ada & Canyon Counties with a 1-Year Lag



869900

City of Meridian v. Petra Inc.  
 Analysis of Cost of Capital using the Build-Up Method  
 as of 10/10/10

Schedule 9

<u>Element</u>	<u>Amount</u>	<u>Source</u>	<u>Notes</u>
Proxy for Risk Free Rate	1.14%	US Federal Reserve	5-Year Constant Maturity Treasury
Intermediate Term Equity Risk Premium	7.20%	Ibbotson Associates	Historical Average, 1926-2009
Industry Risk Premium	2.04%	Ibbotson Associates	SIC 15
Size Premium	3.99%	Ibbotson Associates	Average of 9th and 10th deciles
Company Specific Risk	3.00%	Hooper Cornell	
<b>Estimated Cost of Intermediate Term Equity Capital</b>	<b>17.4%</b>		

669900

**City of Meridian v. Petra Inc.**  
**Calculation of Economic Damages--Scenario 1**

**Schedule 10**

<u>Contract Management (CM) Losses</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>	<u>2019</u>	<u>2020</u>
Growth Rate of CM Revenues				1.00%	1.50%	2.00%	2.50%	3.00%	3.00%	3.00%	3.00%	3.00%
Overall Market Activity	\$588,300,494	\$405,339,488	\$315,000,000	\$318,150,000	\$322,922,250	\$329,380,695	\$337,615,212	\$347,743,669	\$358,175,979	\$368,921,258	\$379,988,896	\$391,388,563
Lost Market Share	1.00%	1.00%	1.00%	1.00%	1.00%	1.00%	1.00%	1.00%	1.00%	1.00%	1.00%	1.00%
Lost CM Volume	\$5,883,005	\$4,053,395	\$3,150,000	\$3,181,500	\$3,229,223	\$3,293,807	\$3,376,152	\$3,477,437	\$3,581,760	\$3,689,213	\$3,799,889	\$3,913,886
Historical Average CM Fees	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%
Lost CM Fees	\$264,735	\$182,403	\$141,750	\$143,168	\$145,315	\$148,221	\$151,927	\$156,485	\$161,179	\$166,015	\$170,995	\$176,125
Lost CM Reimbursed Salaries	\$0	\$0	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000
<b>Total CM Losses</b>	<b>\$264,735</b>	<b>\$182,403</b>	<b>\$291,750</b>	<b>\$293,168</b>	<b>\$295,315</b>	<b>\$298,221</b>	<b>\$301,927</b>	<b>\$306,485</b>	<b>\$311,179</b>	<b>\$316,015</b>	<b>\$320,995</b>	<b>\$326,125</b>
<b>Contract Revenue Losses</b>												
Growth Rate of Contract Revenues				1.00%	1.50%	2.00%	2.50%	3.00%	3.00%	3.00%	3.00%	3.00%
Overall Market Activity	\$588,300,494	\$405,339,488	\$315,000,000	\$318,150,000	\$322,922,250	\$329,380,695	\$337,615,212	\$347,743,669	\$358,175,979	\$368,921,258	\$379,988,896	\$391,388,563
Lost Market Share	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%
Lost Contract Revenue	\$11,766,010	\$8,106,790	\$6,300,000	\$6,363,000	\$6,458,445	\$6,587,614	\$6,752,304	\$6,954,873	\$7,163,520	\$7,378,425	\$7,599,778	\$7,827,771
Incremental Profit Margin	4.7%	4.7%	4.7%	4.7%	4.7%	4.7%	4.7%	4.7%	4.7%	4.7%	4.7%	4.7%
<b>Total Lost Contract Profits</b>	<b>\$553,002</b>	<b>\$381,019</b>	<b>\$296,100</b>	<b>\$299,061</b>	<b>\$303,547</b>	<b>\$309,618</b>	<b>\$317,358</b>	<b>\$326,879</b>	<b>\$336,685</b>	<b>\$346,786</b>	<b>\$357,190</b>	<b>\$367,905</b>
 Increase in Liability Insurance Expense	 \$0	 \$75,000	 \$75,000	 \$75,000	 \$75,000	 \$75,000	 \$75,000	 \$75,000	 \$75,000	 \$75,000	 \$75,000	 \$75,000
 <b>Total Nominal Losses</b>	 <b>\$817,738</b>	 <b>\$638,422</b>	 <b>\$662,850</b>	 <b>\$667,229</b>	 <b>\$673,862</b>	 <b>\$682,839</b>	 <b>\$694,285</b>	 <b>\$708,364</b>	 <b>\$722,865</b>	 <b>\$737,801</b>	 <b>\$753,185</b>	 <b>\$769,030</b>
Risk-Adjusted Discount Rate	17.4%											
Present Value Date	10/10/10											
Cash Flow Date		12/31/10	06/30/11	06/30/12	06/30/13	06/30/14	06/30/15	06/30/16	06/30/17	06/30/18	06/30/19	06/30/20
No. of Discount Periods	0	0.22	0.72	1.72	2.72	3.72	4.72	5.72	6.72	7.72	8.72	9.72
Present Value of Nominal Losses	\$817,738	\$615,874	\$590,650	\$506,395	\$435,789	\$376,283	\$326,005	\$283,298	\$246,340	\$214,243	\$186,363	\$162,070
<b>Cumulative Present Value of Losses</b>	<b>\$817,738</b>	<b>\$615,874</b>	<b>\$1,206,524</b>	<b>\$1,712,920</b>	<b>\$2,148,709</b>	<b>\$2,524,992</b>	<b>\$2,850,997</b>	<b>\$3,134,295</b>	<b>\$3,380,634</b>	<b>\$3,594,877</b>	<b>\$3,781,240</b>	<b>\$3,943,310</b>

006700

**Lost Market Share**

Contract Projects			Contract Projects		
Pre-Loss Market Share	Average Post-Loss Market Share	Lost Market Share	Pre-Loss Market Share	Average Post-Loss Market Share	Lost Market Share
5.75%	2.51%	3.24%	1.06%	0.06%	1.00%
6.35%	2.51%	3.84%	1.25%	0.06%	1.19%
3.66%	2.51%	1.15%	1.00%	0.06%	0.95%
3.73%	2.51%	1.22%	1.56%	0.06%	1.51%
4.65%	2.51%	2.13%	0.85%	0.06%	0.80%
5.93%	2.51%	3.42%	1.16%	0.06%	1.11%
3.63%	2.51%	1.12%	0.99%	0.06%	0.94%
4.19%	2.51%	1.68%	1.75%	0.06%	1.70%
		Minimum			Minimum
		Maximum			Maximum
		Median			Median
		Mean			Mean
		Std Deviation			Std Deviation
		1.12%			0.80%
		3.84%			1.70%
		1.90%			1.06%
		2.22%			1.15%
		1.12%			0.31%
		Normal Distribution			Normal Distribution

**Incremental Margins**

Year	Contract Projects	Construction Management
2004	5.29%	4.07%
2005	4.20%	2.92%
2006	3.90%	2.97%
2007	3.61%	4.08%
2008	4.76%	4.37%
2009	4.69%	4.78%
Minimum	3.61%	2.92%
Maximum	5.29%	4.78%
Median	4.44%	4.07%
Mean	4.41%	3.86%
Std Deviation	0.62%	0.76%
		Normal Distribution

**Revenue Growth Rate 2011 and 2012**

Low	-5.00%	Triangular Distribution
Most likely	2.00%	
High	4.00%	

**Revenue Growth Rate 2014 - 2020\***

Minimum	-1.36%	Normal Distribution
Maximum	14.62%	
Median	6.46%	
Mean	7.00%	
Std Deviation	3.12%	

\*Annual Change in US GDP, Nominal Basis, 1969-2010

006701

Simulation Statistics

No. of Trials 100,000  
Time 83.140625  
Seed 1

**XLSTAT**  
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	<u>Output 1</u>	<u>Output 2</u>	<u>Output 3</u>	<u>Output 4</u>	<u>Output 5</u>	<u>Output 6</u>	<u>Output 7</u>	<u>Output 8</u>	<u>Output 9</u>	<u>Output 10</u>	<u>Output 11</u>	<u>Output 12</u>
<b>Average</b>	837,976	651,949	673,311	675,024	676,138	707,844	741,885	777,185	817,269	859,505	903,390	948,368
<b>Std Dev</b>	317,376	218,303	169,880	169,580	171,915	183,839	198,106	211,871	227,443	244,247	261,248	280,879
<b>Std Err</b>	1,004	690	537	536	544	581	626	670	719	772	826	888
<b>Max</b>	2,382,776	1,684,225	1,674,579	1,630,734	1,616,925	1,707,104	2,102,659	2,073,329	2,019,410	2,298,990	2,299,289	2,482,085
<b>Min</b>	-840,696	-225,270	-9,814	-123,289	-46,985	26,056	-138,510	-166,626	-183,534	-230,446	-192,059	-152,775
<b>Percentiles</b>												
5%	334,210	307,079	405,140	406,356	404,599	417,140	430,223	445,020	460,984	478,966	496,316	510,640
10%	440,758	379,395	461,657	463,598	462,178	478,751	495,616	514,540	535,509	558,866	580,315	601,698
15%	514,578	429,236	500,624	502,197	501,409	520,816	539,707	562,021	585,967	611,036	637,828	663,169
20%	571,265	468,388	530,588	533,080	532,088	554,105	575,454	600,692	626,189	654,414	684,580	713,244
25%	621,184	502,038	557,056	559,648	559,410	582,811	606,504	632,436	661,024	691,773	724,065	757,044
30%	666,431	534,108	581,530	583,798	583,873	608,482	633,752	661,895	693,148	725,926	760,336	795,622
35%	708,945	563,220	603,850	606,289	606,079	632,514	660,135	689,351	722,447	758,224	794,678	831,970
40%	749,517	590,889	625,758	627,585	627,820	656,297	685,269	715,927	751,786	788,844	827,396	867,460
45%	788,823	617,741	646,315	648,587	649,073	678,342	709,999	742,377	780,271	819,210	859,504	902,003
50%	826,970	644,889	667,393	669,331	670,314	700,456	734,520	768,207	808,767	848,648	891,731	936,063
55%	867,303	672,472	688,270	690,196	691,551	723,651	758,708	794,931	836,636	878,383	923,761	970,413
60%	906,903	700,301	710,333	711,828	713,190	746,980	784,129	821,641	865,112	909,816	957,767	1,006,125
65%	949,627	729,304	733,120	734,656	735,939	770,897	810,644	849,392	895,610	942,252	992,852	1,043,522
70%	994,033	760,371	757,275	758,559	760,452	797,449	838,791	879,417	927,535	976,755	1,029,759	1,083,079
75%	1,042,946	793,809	784,002	785,148	787,144	826,681	869,398	912,971	962,958	1,015,113	1,071,446	1,126,190
80%	1,100,387	830,871	813,533	815,239	817,120	858,935	904,514	950,423	1,003,570	1,058,648	1,116,943	1,176,345
85%	1,163,304	875,997	848,242	849,569	852,154	896,957	946,278	994,163	1,050,795	1,108,638	1,170,741	1,235,133
90%	1,246,755	932,818	892,524	893,614	897,858	946,242	998,668	1,051,386	1,111,506	1,174,837	1,241,121	1,310,333
95%	1,376,507	1,022,651	960,514	962,461	968,719	1,021,425	1,080,069	1,138,596	1,205,403	1,281,357	1,351,017	1,430,559
100%	2,382,776	1,684,225	1,674,579	1,630,734	1,616,925	1,707,104	2,102,659	2,073,329	2,019,410	2,298,990	2,299,289	2,482,085

006702

City of Meridian v. Petra Inc.  
Calculation of Economic Damages--Scenario 2

Schedule 13

<u>Contract Management (CM) Losses</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>	<u>2019</u>	<u>2020</u>
Growth Rate of CM Revenues				-0.18%	0.11%	3.74%	11.80%	8.63%	6.90%	9.33%	3.78%	5.80%
Overall Market Activity	\$588,300,494	\$405,339,488	\$315,000,000	\$314,436,360	\$314,780,672	\$326,569,198	\$365,088,282	\$396,581,474	\$423,961,240	\$463,523,729	\$481,057,475	\$508,969,084
Lost Market Share	1.1%	1.1%	0.7%	1.6%	1.4%	1.4%	1.0%	0.7%	1.0%	1.9%	1.3%	0.6%
Lost CM Volume	\$6,233,093	\$4,306,622	\$2,112,048	\$5,010,660	\$4,453,226	\$4,656,058	\$3,734,528	\$2,919,874	\$4,357,084	\$8,946,088	\$6,380,209	\$3,087,106
Historical Average CM Fees	4.3%	4.7%	4.2%	3.3%	3.8%	4.4%	5.5%	3.3%	3.4%	5.1%	3.3%	4.3%
Lost CM Fees	\$267,855	\$202,267	\$88,671	\$165,237	\$168,751	\$204,881	\$206,802	\$96,221	\$149,383	\$453,630	\$209,759	\$132,801
Lost CM Reimbursed Salaries	\$0	\$0	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000
<b>Total CM Losses</b>	<b>\$267,855</b>	<b>\$202,267</b>	<b>\$238,671</b>	<b>\$315,237</b>	<b>\$318,751</b>	<b>\$354,881</b>	<b>\$356,802</b>	<b>\$246,221</b>	<b>\$299,383</b>	<b>\$603,630</b>	<b>\$359,759</b>	<b>\$282,801</b>

Contract Revenue Losses

Growth Rate of Contract Revenues				-0.18%	0.11%	3.74%	11.80%	8.63%	6.90%	9.33%	3.78%	5.80%
Overall Market Activity	\$588,300,494	\$405,339,488	\$315,000,000	\$314,436,360	\$314,780,672	\$326,569,198	\$365,088,282	\$396,581,474	\$423,961,240	\$463,523,729	\$481,057,475	\$508,969,084
Lost Market Share	0.8%	3.8%	1.4%	3.2%	1.3%	1.8%	0.8%	1.3%	4.9%	4.3%	2.6%	0.0%
Lost Contract Revenue	\$4,734,308	\$15,478,530	\$4,527,632	\$10,090,276	\$4,123,024	\$5,824,054	\$2,792,902	\$5,079,650	\$20,941,185	\$20,148,444	\$12,741,161	\$224,469
Incremental Profit Margin	4.2%	4.2%	3.9%	3.6%	4.0%	3.7%	4.7%	4.4%	5.0%	4.9%	4.1%	4.9%
<b>Total Lost Contract Profits</b>	<b>\$200,655</b>	<b>\$655,129</b>	<b>\$175,369</b>	<b>\$358,513</b>	<b>\$163,960</b>	<b>\$215,545</b>	<b>\$131,198</b>	<b>\$222,756</b>	<b>\$1,057,407</b>	<b>\$981,362</b>	<b>\$524,346</b>	<b>\$10,925</b>

<b>Increase in Liability Insurance Expense</b>	<b>\$0</b>	<b>\$75,000</b>	<b>\$75,000</b>	<b>\$75,000</b>	<b>\$75,000</b>	<b>\$75,000</b>	<b>\$75,000</b>	<b>\$75,000</b>	<b>\$75,000</b>	<b>\$75,000</b>	<b>\$75,000</b>	<b>\$75,000</b>
<b>Simulated Nominal Losses</b>	<b>\$468,510</b>	<b>\$932,396</b>	<b>\$489,040</b>	<b>\$748,750</b>	<b>\$557,712</b>	<b>\$645,426</b>	<b>\$563,000</b>	<b>\$543,977</b>	<b>\$1,431,790</b>	<b>\$1,659,991</b>	<b>\$959,105</b>	<b>\$368,726</b>

**Important Note:**

The rows above are presented only to help convey the structure of the projection model, not the results. Because this analysis relies on Monte Carlo simulation, the projected results shown above will change every time the spreadsheet is recalculated (i.e., every time any key is struck). The actual results stemming from this model are presented below on the line styled as "model output." Monte Carlo input variables are shown on Schedule 11, detailed output results by percentile are presented on Schedule 12.

<b>Model Output</b>	<b>\$837,976</b>	<b>\$651,949</b>	<b>\$673,311</b>	<b>\$675,024</b>	<b>\$676,138</b>	<b>\$707,844</b>	<b>\$741,885</b>	<b>\$777,185</b>	<b>\$817,269</b>	<b>\$859,505</b>	<b>\$903,390</b>	<b>\$948,368</b>
Risk-Adjusted Discount Rate	17.4%											
Present Value Date	10/10/10											
Cash Flow Date		12/31/10	06/30/11	06/30/12	06/30/13	06/30/14	06/30/15	06/30/16	06/30/17	06/30/18	06/30/19	06/30/20
No. of Discount Periods	0	0.22	0.72	1.72	2.72	3.72	4.72	5.72	6.72	7.72	8.72	9.72
<b>Present Value of Nominal Losses</b>	<b>\$837,976</b>	<b>\$628,924</b>	<b>\$599,972</b>	<b>\$512,312</b>	<b>\$437,261</b>	<b>\$390,062</b>	<b>\$348,356</b>	<b>\$310,822</b>	<b>\$278,511</b>	<b>\$249,584</b>	<b>\$223,529</b>	<b>\$199,864</b>
<b>Cumulative Present Value of Losses</b>	<b>\$837,976</b>	<b>\$628,924</b>	<b>\$1,228,895</b>	<b>\$1,741,208</b>	<b>\$2,178,469</b>	<b>\$2,568,530</b>	<b>\$2,916,887</b>	<b>\$3,227,708</b>	<b>\$3,506,219</b>	<b>\$3,755,803</b>	<b>\$3,979,332</b>	<b>\$4,179,196</b>

006703

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## Professional Qualifications

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## **Keith A. Pinkerton, CFA, ASA**

### **Education**

Bachelor of Arts (Economics), University of South Florida (Tampa, Florida), 1991

Master of Business Administration (Finance), Baylor University (Waco, Texas), 1996

### **Professional Certifications**

Chartered Financial Analyst—the CFA Institute, Charter Number 45208, awarded September 2001.

Accredited Senior Appraiser, Business Valuation discipline, the American Society of Appraisers, awarded 2003.

### **Professional Employment History**

2005 – Present	Director of Valuation Services, Hooper Cornell, PLLC, Boise, Idaho
2009 - 2009	Adjunct Professor of Finance, George Fox University, Boise Center
2003 – 2005	Valuation Manager, Pershing Yoakley & Associates, Knoxville, Tennessee
2000 – 2003	Valuation Manager, WP Valuation Services, Fort Worth, Texas
1995 – 2000	Manager, the Perryman Group, Waco, Texas
1991 – 1995	Economist, United States Department of Agriculture, Washington, DC

### **Memberships and Affiliations**

- The CFA Institute ([www.cfainstitute.org](http://www.cfainstitute.org))
- The CFA Society of Idaho
- The American Society of Appraisers ([www.appraisers.org](http://www.appraisers.org))
- National Association for Business Economics ([www.nabe.com](http://www.nabe.com))
- National Association of Forensic Economics ([www.nafe.net](http://www.nafe.net))
- Treasure Valley Estate Planning Council
- Ludwig von Mises Institute for Austrian Economics ([www.mises.org](http://www.mises.org))
- Business Valuation Discussion Group ([www.bvdg.org](http://www.bvdg.org))

### **Articles, Presentations and Professional Activities**

- Co-Author, *Marketability & Lack of Control Discounts*, Paper presented to the American Academy of Matrimonial Lawyers, March 2002
- Panelist, *Helping a Business Survive a Down Cycle*, Panel discussion for the Fort Worth Chapter of the Texas Society of CPAs, February 2003
- Speaker, *Business Valuation Update: Hot Issues*, Presented to the Institute of Management Accountants, East Tennessee State University, September 2003
- Speaker, *Business Valuation Update: Hot Issues*, Presentation to the Institute of Management Accountants, Knoxville Chapter, September 2003
- Speaker, *Litigation Support & Professional Practice Valuation*, Presentation to the Institute of Management Accountants, Knoxville Chapter, December 2003
- Speaker, *SFAS No. 141 & 142, Business Combinations and Intangible Assets*, Presentation to the Fort Worth Chapter of the Texas Society of CPAs, November, 2002
- Grader, *2002, 2003, and 2004 Chartered Financial Analyst Examinations*, the CFA Institute, Charlottesville, VA.
- Speaker, *AICPA's Proposed Business Valuation Standards*, Presentation to Idaho Society of Certified Public Accountants, September, 2005.
- Member, *Domestic Review Team, 2007 Chartered Financial Analyst Examination*, CFA Institute, Charlottesville, VA.



**Keith A. Pinkerton, CFA, ASA (continued)**

- Speaker, *Business Valuation and Credit Analysis: Similarities and Differences*, Presentation to US Bank, Boise, Idaho, May, 2005.
- Speaker, *AICPA's Proposed Business Valuation Standards*, Presentation to Idaho Society of Certified Public Accountants, September, 2005.
- Speaker, *Business Valuation Basics*, Presentation to TechHelp—Idaho Falls, September, 2005.
- Speaker, *Business Valuation, Hot Issues for 2006 and Beyond*, Presentation to Idaho Society of Certified Public Accountants, January, 2006.
- Guest-Lecturer, *Differences in Valuation of Publicly-Traded and Privately-Held Companies*, Presented to MBA students at Boise State University, April, 2006.
- Speaker, *Business Valuation Basics and How to Use Valuation/Finance Theory to Increase the Value of Your Business*, Boise Metro Chamber of Commerce, May, 2006.
- Speaker, *Privately-held Companies v. Publicly Traded Stock: Differences and Issues for Valuation*, Presented to the CFA Society of Idaho, May 2006.
- Co-Author, *For What Its Worth*, a recurring column in the Idaho Business Review, 2006 - 2009.
- Co-Author, *Company-Specific Risk—A Different Paradigm: A New Benchmark*, Business Valuation Review, Spring 2006, Volume 25, No.1.
- Speaker, *2006 Tax Court Case Update*, Treasure Valley Estate Planning Council, June 2006.
- Author, *2006 Valuation Court Case Update*, September 27, 2006.
- Speaker, *Top Estate Planning, Wealth Transfer and Asset Protection Techniques*, Sept. 2006.
- Co-Author, *The Guideline Publicly Traded Company Method and the Market Value of Invested Capital*, Business Valuation Review, Summer 2006, Volume 25, No.2.
- Co-Author, *Quantification of Company-Specific Risk: A New Empirical Framework with Practical Applications*, Business Valuation Update, Volume 13, Number 2; February 2007.
- Author, *Does The Pension Protection Act of 2006 Impact All Tax Valuations? An Assessment of the New Law's Reach*, Adjusting Entries, the Journal of the ISCPA, Issue I, 2007.
- Panelist, *Quantifying Company Specific Risk*, an audio telephone conference for business appraisers hosted by Business Valuation Resources, March 8, 2007.
- Guest-Lecturer, *Understanding Valuation of Private Companies*, Presentation to graduate Finance class at Boise State University, May, 2007.
- Co-Author, *Buy-Sell Agreements: A Misnomer?* Adjusting Entries, Journal of the ISCPA, Issue II, 2007.
- Speaker, *Business Valuation Basics & How to Sell Your Company for Top Dollar*, Pocatello Small Business Development Center, March 2007.
- Speaker, *Quantifying Company Specific Risk*, internal training seminar presented to a Top 100 public accounting firm, Minneapolis, MN, May 23, 2007.
- Co-Author, *Quantifying Company-Specific Risk: The Authors Answer Your Questions*, Business Valuation Update, Volume 13, Number 5; May 2007.
- Speaker, *Quantifying Company Specific Risk*, appraisal training session presented at the Institute of Business Appraisers 2007 Symposium; Denver, CO, June 2007.
- Co-Author, *A Hybrid Restricted Stock/Pre-IPO Data Point: Lack of Marketability Discount for ESOPs*; Business Valuation Review, Summer 2007, Volume 26, No.2.
- Speaker, *The Case of the Disappearing Debt: Valuation or Lost Profits with Changing Assumptions*; appraisal training Session presented at the Institute of Business Appraisers 2007 Symposium; Denver, CO, June 2007.
- Co-Author, *Company Specific Risk: The Dow 30 vs. Private Company USA*; The Value Examiner, September/October 2007.

**Keith A. Pinkerton, CFA, ASA (continued)**

- Co-Developer, *Company-Specific Risk Calculator*, a commercial program for computing company-specific risk for publicly-traded benchmarks; available on [www.bvmarketdata.com](http://www.bvmarketdata.com).
- Co-Author, *Stock Options: Corporate Lottery Ticket—or Not?*, *Adjusting Entries*, the Journal of the ISCPA, Issue 2, 2007.
- Co-Author, *Comparing the Butler-Pinkerton Model to Traditional Methods Under Four Daubert Criteria*; *Business Valuation Update*, Volume 13, Number 11; November 2007.
- Co-Author, *Quantifying Company-Specific Risk—Regardless of Your Faith in Beta*; *Business Appraisal Practice*, Winter 2007
- Co-Author, *Company-Specific Risk: Believe It or Not - You Can Quantify It!* *Adjusting Entries*, the Journal of the ISCPA, Issue I, 2008.
- Panelist, *Using the BPM™ Total Cost of Equity and Public Company Specific Risk Calculator™*; an audio telephone conference hosted by NACVA and Business Valuation Resources, March 8, 2007.
- Co-Author, *Butler Pinkerton Model™ Finds Another Application in SFAS 123R*; *Business Valuation Update*, Volume 14, No.3, March, 2008.
- Co-Author, *Total Cost of Equity of Company-Specific Risk—A Better Use for the BPM?*; *Business Valuation Update*, Volume 14, No.4, April 2008.
- Co-Author, *Why You Should Be Aware of the Impact of SSVS-1*; *Adjusting Entries*, the Journal of the ISCPA, Issue II, 2008.
- Speaker, *Pension Plans and Closely-Held Companies, Valuing Tricky Assets in Divorce*; presented to the Idaho State Bar Association; Boise, Idaho; May 9, 2008.
- Speaker, *The Butler Pinkerton Model: Empirical Support for Company Specific Risk*; presented to the National Association of Certified Valuation Analysts, Las Vegas, NV; June 10, 2008.
- Speaker, *The Butler Pinkerton Model: Empirical Support for Company Specific Risk*; presented to the California Society of Certified Public Accountants—BVFLS Section, Las Angeles, CA; Aug 21, 2008.
- Speaker, *Using the Butler Pinkerton Model in Valuation Reports*; an Internet webinar hosted by the National Association of Certified Valuation Analysts; December 5, 2008.
- Co-Author, *There's a New Beta in Town, and Its Name is Total Beta*; *Business Valuation Update*, Volume 15, No.3, March 2009.
- Co-Author, *Butler Pinkerton Model Report*, an E-book published by Morningstar, March, 2009.
- Co-Author, *A Total Repudiation of Mr. Kasper's Critique of the Butler Pinkerton Model*, an online article disseminated through [www.bvmarketdata.com](http://www.bvmarketdata.com), May 2009.
- Author, *Response to Larry Kasper Regarding the Diversification Argument*; *The Value Examiner*, January/February 2010
- Co-Author, *Total Beta: the Missing Piece of the Cost of Capital Puzzle*; *Valuation Strategies*, May/June, 2009.
- Speaker, *Cost of Capital*, California Society of CPAs, May 2009
- Speaker, *Cost of Capital*, presented to the National Association of Certified Valuation Analysts, Boston, MA; May 27, 2009.
- Speaker, *Getting the Most from Your Financial Expert in Personal Injury Litigation Matters*, a CLE presentation to various Boise-area law firms, various dates, 2009.
- Author, *The Search for Value*, published in the quarterly newsletter of George Fox University, Fall, 2009.
- Speaker, *Buy-Sell Disagreements and Solutions*, presented to the Boise Estate Planning Council, November 2, 2009.
- Speaker, *Business Valuation: Demystifying the Process*, presented to attorneys and clients of Perkins Coie, LLP, March 30, 2010.
- Co-Author, *Financing Your Practice*, *Chiropractic Economics*, Volume 56, Issue 5; March 29, 2010.

**Keith A. Pinkerton, CFA, ASA (continued)**

- Author, *The Wonder Years: Integrating Your Practice into a Comprehensive Retirement Plan*, *Chiropractic Economics*, Volume 56, Issue 6; April 20, 2010.
- Author; *An Update on Proposed IRS' Appraiser Penalty Procedures; Adjusting Entries*, the *Journal of the ISCPA*, Issue II, 2010.
- Co-Author, *Give it to me Straight: Answers to Old Questions about Buy or Lease*; *Chiropractic Economics*, Volume 56, Issue 7; May 12, 2010.
- Author, *Sale-abrate Your Practice*; *Chiropractic Economics*, Volume 56, Issue 10; June 25, 2010.
- Author, *Financial Accounting and Managerial Accounting Compared*, a paper to accompany the seminar *Accounting 101 for Attorneys*, presented August 12, 2010.
- Author, *Financial Statement Basic Concepts*, a paper to accompany the seminar *Accounting 101 for Attorneys*, presented August 12, 2010.
- Instructor, *Accounting 101 for Attorneys*, a CLE presentation given to area attorneys on August 12, 2010
- Speaker, *Buy Sell Agreements: Road Map to Success or Recipe for Disaster*, presented at the Idaho State Bar's Annual Advanced Estate Planning Seminar, September 2010.

**Expert Testimony**

- Cause No. 99-20905-V in the 303rd District Court of Dallas County; Dallas, Texas, Trial Testimony, Business Appraisal for Marital Dissolution; retained by Plaintiff(s).
- Cause No. 296-50175-01 in the 296th District Court of Colin County; McKinney, Texas, Trial Testimony, Business Appraisal for Marital Dissolution; retained by Plaintiff(s).
- Cause No. 158874-2 in the Chancery Court for Knox County, Knoxville, Tennessee, Trial Testimony, Quantification of Economic Damages—Dissenting Shareholder matter; retained by Plaintiff(s).
- Cause No. 153673-3 in the Chancery Court for Knox County, Knoxville, Tennessee, Deposition Testimony, Quantification of damages associated with the purchase of an operating business; retained by Plaintiff(s).
- Civil Action No. 05-CI-00233, Bell Circuit Court, Commonwealth of Kentucky, Deposition Testimony, Business appraisal and quantification of economic damages for dissenting shareholder matter; retained by Defendant(s).
- Civil Action No. 05-CI-00233, Bell Circuit Court, Commonwealth of Kentucky, Trial Testimony, Business appraisal and quantification of economic damages for dissenting shareholder matter; retained by Defendant(s).
- Civil Case No. CV-05-12224, Canyon County District Court, State of Idaho, Deposition Testimony, Quantification of damages associated with bad faith claim; retained by Defendant(s).
- Civil Case No. 1:06-CV-141-S-EJL, United States District Court, District of Idaho, Deposition Testimony, Quantification of damages associated with alleged trade-loading and breach of duty; retained by Defendant(s).
- Civil Case No. CV-2005-493-C, Valley County District Court, State of Idaho, Deposition Testimony, Quantification of damages associated with breach of contract; retained by Defendant(s).
- Civil Case No. CV DR 0722658, Ada County District Court, State of Idaho, Trial Testimony, Business appraisal for marital dissolution; retained by Defendant(s).
- Civil Case No. CV OC 0608433, Ada County District Court, State of Idaho, Deposition Testimony, quantification of damages associated with defamation claim; retained by Plaintiff(s).
- Civil Case No. CV-2008-1069-OC, Bannock County District Court, State of Idaho, Deposition Testimony, quantification of damages associated with defamation and interference with prospective advantage.
- Civil Case No. CV-PI-0718437, Ada County District Court, State of Idaho, Trial Testimony, quantification of economic damages associated with wrongful death and personal injury; retained by Defendant(s).
- Civil Case No. CV-2006-3325-PI, Bannock County District Court, State of Idaho, Trial Testimony, quantification of economic damages associated with personal injury; retained by Defendant(s).

- Civil Case No. CV-PI-0704871, Ada County District Court, State of Idaho, Trial Testimony, quantification of economic damages associated with personal injury; retained by Defendant(s).
- Appeal Nos. 09-A-1335 and 09-A-1336, Idaho Board of Tax Appeals; Rebuttal Testimony, proper application of appraisal theory; retained by Defendant(s).
- Civil Case No. CV-07-663, Jefferson County District Court, State of Idaho, Trial Testimony, quantification of damages associated with bad faith claim; retained by Defendant(s).
- Civil Case No. CV DR 2009-06035, Ada County District Court, State of Idaho, Trial Testimony, Business appraisal for marital dissolution; retained by Plaintiff(s).
- Civil Case No. CV OC 0902282, Ada County District Court, State of Idaho, Deposition Testimony, analysis of lost profits associated with breach of contract and misappropriation of trade secrets; retained by Defendant(s).
- Civil Case No. CV OC 0902282, Ada County District Court, State of Idaho, Trial Testimony, analysis of lost profits associated with breach of contract and misappropriation of trade secrets; retained by Defendant(s).

**Professional Billing Rate**

\$285 per hour

ORIGINAL

NO. \_\_\_\_\_  
FILED 3:41  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

OCT 22 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

Thomas G. Walker (ISB 1856)  
Erika Klein (ISB 5509)  
Mackenzie Whatcott (ISB 6774)  
Matthew Schelstrate (ISB 8276)  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
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E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com)  
[mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com).

Attorneys for Defendant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE VACATING DEPOSITIONS

Defendant Petra Incorporated ("Petra"), by and through its attorney of record, Thomas G. Walker, of the law firm Cosho Humphrey, LLP, hereby provides notice that it is vacating the following depositions.

Jason Neidigh scheduled October 25, 2010;

Lee Cotton scheduled October 28, 2010; and

Leo Geiss scheduled October 28, 2010.

DATED: October 22, 2010

**COSHO HUMPHREY, LLP**

By: 

THOMAS G. WALKER

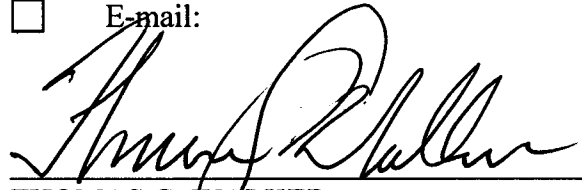
Attorneys for Defendants, Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 22nd day of October, 2010, a true and correct copy of the within and foregoing document was served upon the following in the manner indicated:

Kim J. Trout, Esq.  
Daniel Loras Glynn  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

<input type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Hand Delivery
<input type="checkbox"/>	Overnight Courier
<input checked="" type="checkbox"/>	Facsimile:
<input type="checkbox"/>	E-mail:

  
THOMAS G. WALKER

**OCT 27 2010**

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

**KIM J. TROUT, ISB #2468**  
**DANIEL LORAS GLYNN, ISB #5113**  
**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.**  
225 North 9th Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701  
Telephone: (208) 331-1170  
Facsimile: (208) 331-1529

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**MOTION TO SHORTEN TIME FOR  
HEARING RE: PLAINTIFF'S MOTION  
FOR ORDER APPROVING  
PERMISSION TO APPEAL FROM AN  
INTERLOCUTORY ORDER  
PURSUANT TO IDAHO APPELLATE  
RULE 12**

COMES NOW Plaintiff the City of Meridian ("City"), by and through its counsel of record, the law firm of TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A., and hereby moves this Court, pursuant to Rule 6(b) of the Idaho Rules of Civil Procedure, for an order shortening the time for notice of hearing on Plaintiff's Motion for Order Approving Permission to Appeal From an Interlocutory Order Pursuant to Idaho Appellate Rule 12. The motion was filed on October 14, 2010 and the Defendant filed an opposition on October 21, 2010. Plaintiff requests the hearing be set for November 5, 2010 at 1:00 p.m.

**MOTION TO SHORTEN TIME FOR HEARING ON RE: PLAINTIFF'S MOTION FOR ORDER  
APPROVING PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER PURSUANT TO  
IDAHO APPELLATE RULE 12**



DATED this 27<sup>th</sup> day of October, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
GOURLEY, P.A.

By: \_\_\_\_\_

Kim J. Trout

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 27th day of October, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSH O HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
P.O. Box 9518  
Boise, ID 83707-9518  
Fax: (208) 639-5609

Hand Delivered  
U.S. Mail  
Fax  
Fed. Express  
Email

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<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>



Kim J. Trout

Q. \_\_\_\_\_ FILED 3:49  
A.M. \_\_\_\_\_ P.M.

OCT 27 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

**KIM J. TROUT, ISB #2468**  
**DANIEL LORAS GLYNN, ISB #5113**  
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.  
225 North 9th Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701  
Telephone: (208) 331-1170  
Facsimile: (208) 331-1529

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.


Case No. CV OC 09-7257

**AMENDED NOTICE OF HEARING RE:  
PLAINTIFF'S MOTION FOR ORDER  
APPROVING PERMISSION TO APPEAL  
FROM AN INTERLOCUTORY ORDER  
PURSUANT TO IDAHO APPELLATE  
RULE 12**

PLEASE TAKE NOTICE, that the hearing currently scheduled on Monday, the 15<sup>th</sup> day of November, 2010, at the hour of 11:00 a.m. is hereby vacated and scheduled to be heard on the Friday, the 5<sup>th</sup> day of November, 2010 at the hour of 1:00 p.m., or as soon thereafter as counsel can be heard.

DATED this 27<sup>th</sup> day of October, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
GOURLEY, P.A.

By:   
Kim J. Trout

NOTICE OF HEARING RE: PLAINTIFF'S MOTION FOR ORDER APPROVING PERMISSION TO APPEAL  
FROM AN INTERLOCUTORY ORDER PURSUANT TO IDAHO APPELLATE RULE 12 - 1

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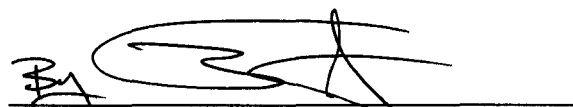
### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of October, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
P.O. Box 9518  
Boise, ID 83707-9518  
Fax: (208) 639-5609

Hand Delivered  
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Daniel Loras Glynn

RECEIVED

OCT 27 2010

Ada County Clerk

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. 9:45 P.M. \_\_\_\_\_

OCT 28 2010

**KIM J. TROUT, ISB #2468**

**DANIEL LORAS GLYNN, ISB #5113**

**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.**

225 North 9th Street, Suite 820

P.O. Box 1097

Boise, ID 83701

Telephone: (208) 331-1170

Facsimile: (208) 331-1529

J. DAVID NAVARRO, Clerk  
By INGA JOHNSON  
DEPUTY

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**ORDER TO SHORTEN TIME FOR  
HEARING RE: PLAINTIFF'S MOTION  
FOR ORDER APPROVING  
PERMISSION TO APPEAL FROM AN  
INTERLOCUTORY ORDER  
PURSUANT TO IDAHO APPELLATE  
RULE 12**

THIS COURT having reviewed Plaintiff's Motion for Order Shortening Time and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the time period set forth in Rule 6(d) of the Idaho Rules of Civil Procedure shall be shortened and Plaintiff shall be permitted to argue its Motion for Order Approving Permission to Appeal From an Interlocutory Order Pursuant to Idaho Appellate Rule 12 on November 5, 2010 at 1:00 p.m.

**ORDER TO SHORTEN TIME FOR HEARING RE: PLAINTIFF'S MOTION FOR ORDER  
APPROVING PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER PURSUANT TO  
IDAHO APPELLATE RULE 12**

Page 1

006717

DATED this 28<sup>th</sup> day of Oct, 2010.

By:   
HONORABLE JUDGE WILPER

**CLERK'S CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 28 day of Oct, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSH O HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
P.O. Box 9518  
Boise, ID 83707-9518  
Fax: (208) 639-5609

Hand Delivered ☐  
U.S. Mail ☒  
Fax ☐  
Fed. Express ☐  
Email ☐

Kim J. Trout  
Trout Jones Gledhill Fuhrman Gourley, P.A.  
225 N. 9<sup>th</sup> St., Ste. 820  
P.O. Box 1097  
Boise, ID 83701

Hand Delivered ☐  
U.S. Mail ☒  
Fax ☐  
Fed. Express ☐  
Email ☐

**J. DAVID NAVARRO**  
CLERK OF THE COURT

  
\_\_\_\_\_  
Inga Johnson  
Deputy Clerk

ORDER TO SHORTEN TIME FOR HEARING RE: PLAINTIFF'S MOTION FOR ORDER  
APPROVING PERMISSION TO APPEAL FROM AN INTERLOCUTORY ORDER PURSUANT TO  
IDAHO APPELLATE RULE 12

ORIGINAL

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_  
FILED **3:28**

**OCT 29 2010**

**J. DAVID NAVARRO, Clerk**  
By **J. RANDALL**  
DEPUTY

Thomas G. Walker (ISB 1856)  
Erika Klein (ISB 5509)  
Mackenzie Whatcott (ISB 6774)  
Matthew Schelstrate (ISB 8276)  
COSHO HUMPHREY, LLP  
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E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com)  
[mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com).

Attorneys for Defendant, Petra Incorporated

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**NOTICE OF SERVICE OF  
DISCOVERY RESPONSES**

NOTICE IS HEREBY GIVEN that on this 29th day of October, 2010, Defendant Petra Incorporated's Response Dated October 29, 2010 to the City of Meridian's Fifth Requests for Production of Documents, together with a copy of this Notice of Service of Discovery was

served on or about October 29, 2010 upon counsel for Plaintiff, The City of Meridian in the manner set forth below:

Kim J. Trout  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

<input type="checkbox"/>	U.S. Mail
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THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_  
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OCT 29 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

Thomas G. Walker (ISB 1856)  
Erika Klein (ISB 5509)  
Mackenzie Whatcott (ISB 6774)  
Matthew Schelstrate (ISB 8276)  
COSH O HUMPHREY, LLP  
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E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com)  
[mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com).

Attorneys for Defendant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE OF SERVICE OF  
DISCOVERY RESPONSES

NOTICE IS HEREBY GIVEN that on this 29th day of October, 2010, Defendant Petra Incorporated's Supplemental Response Dated October 29, 2010 to the City of Meridian's First Set of Interrogatories and Requests for Production of Documents, together with a copy of this



Notice of Service of Discovery was served on or about October 29, 2010 upon counsel for Plaintiff, The City of Meridian in the manner set forth below:

Kim J. Trout  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☐ U.S. Mail
- ☒ Hand Delivery
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THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 330

NOV 03 2010

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

The City of Meridian

Plaintiff(s):

AFFIDAVIT OF SERVICE

vs.

Case Number: CV OC 0907257

Petra Incorporated

Defendant(s):

For:  
Coshu Humphrey, LLP  
Washington Group Plaza IV  
800 Park Blvd., Ste. 790  
Boise, ID 83712

STATE OF IDAHO )

:ss

COUNTY OF ADA )

Received by TRI-COUNTY PROCESS SERVING LLC on October 29, 2010 to be served on **LABOR  
READY NORTHWEST, INC..**

I, Zach D. Heesch, who being duly sworn, depose and say that on Monday, November 1, 2010, at 12:23 PM, I:

**SERVED** the within named **Labor Ready Northwest, Inc.** by delivering a true copy of the **Subpoena for Document Production** to S.J. Tharp of CT Corporation System, Registered Agent for Labor Ready Northwest, Inc.. Said service was effected at **CT Corporation System, 1111 W. Jefferson Street Suite 530, Boise, ID 83702.**

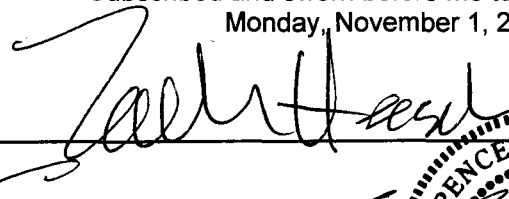
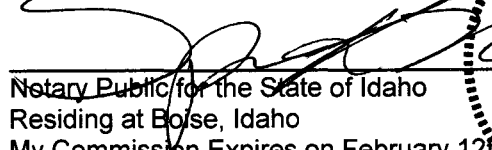
I also tendered and paid the sum of **\$25.00**, (Witness Fee Tendered), at the time and place of service.


I hereby acknowledge that I am a Process Server in the county in which service was effected. I am over the age of Eighteen years and not a party to the action.

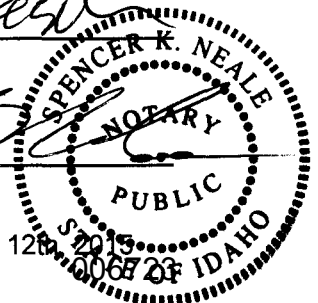
Reference Number: 101276

Client Reference: Thomas G. Walker

Subscribed and sworn before me today  
Monday, November 1, 2010

  
\_\_\_\_\_  
  
\_\_\_\_\_  
Notary Public for the State of Idaho  
Residing at Boise, Idaho  
My Commission Expires on February 12, 2015

  
**TRI-COUNTY PROCESS SERVING LLC**  
P.O. Box 1224  
Boise, ID, 83701  
(208) 344-4132



Thomas G. Walker (ISB 1856)  
Mackenzie Whatcott (ISB 6774)  
COSH O HUMPHREY, LLP  
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E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com)

Attorneys for Defendant, Petra Incorporated

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**SUBPOENA FOR DOCUMENT  
PRODUCTION**

THE STATE OF IDAHO SENDS GREETINGS TO

**Labor Ready Northwest, Inc.  
dba Labor Ready, 1604 Garrity Blvd., Nampa, Idaho 83687  
Labor Ready, 1088 North Orchard Street, Boise, Idaho 83706  
CT Corporation System  
1111 W. Jefferson Street Suite 530  
Boise, Idaho 83702**

YOU ARE COMMANDED:


- ☐ to appear in the Court at the place, date and time specified below to testify in the above case.
- ☐ to appear at the place, date and time specified below to testify at the taking of a deposition in the above case.
- ☒ to produce or permit inspection and copying of the following documents or objects, including electronically stored information, at the place, date and time specified below. (See list of documents or objects on Exhibit A attached hereto.)
- ☐ to permit inspection of the following premises at the date and time specified below.

PLACE DATE AND TIME: Documents shall be produced at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, ID 83712 not later than 5:00 p.m. on November 29, 2010.

You are further notified that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above that you may be held in contempt of court and that the aggrieved party may recover from you the sum of \$100 and all damages which the party may sustain by your failure to comply with this subpoena.

Dated this 29th day of October, 2010.

J. DAVID NAVARRO  
Clerk of the Court

By   
THOMAS G. WALKER  
Attorney Licensed in the State of Idaho

## EXHIBIT A

1. Produce true, correct, complete and legible copies of your file or files, information and documents in any way related to, connected with, attributable to, and associated with any and all documents prepared for or by Labor Ready regarding the new Meridian City Hall project ("Project"), including but not limited to all purchase orders, work orders, invoices, billings and other documents ("Documents") related in any way to modifications, alterations, improvements and repairs of the new Meridian City Hall building, facilities, systems and site improvements ("Project") during the period of time commencing on October 15, 2008 to the date of your response to this subpoena.


2. Produce, true, correct, complete and legible Bates numbered copies of all licenses, certifications and other state issued documentation confirming the qualifications of each person and entity that performed labor or provided materials in any way involving the HVAC system, on behalf of Labor Ready, Inc. for the Project during the period of time commencing on October 15, 2008 to the date of your response to this subpoena.

This subpoena not only calls for the documents in your possession, but also for all documents that are in your care, custody or control or in the care, custody and control of your employees, representatives and attorneys.

DATED this 29th day of October, 2010.

J. DAVID NAVARRO  
Clerk of the Court

By



THOMAS G. WALKER

Attorney Licensed in the State of Idaho

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 29th day of October, 2010, a true and correct copy of  
the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☐ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☒ Facsimile:  
☐ E-mail:

  
\_\_\_\_\_  
THOMAS G. WALKER

NOV 03 2010

J. DAVID NAVARRO, Clerk  
By L. AMES  
DEPUTY

**KIM J. TROUT, ISB #2468**

**DANIEL LORAS GLYNN, ISB #5113**

**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.**

225 North 9th Street, Suite 820

P.O. Box 1097

Boise, ID 83701

Telephone: (208) 331-1170

Facsimile: (208) 331-1529

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**REPLY MEMORANDUM IN SUPPORT  
OF PLAINTIFF'S MOTION FOR  
ORDER APPROVING PERMISSION TO  
APPEAL FROM AN INTERLOCUTORY  
ORDER PURSUANT TO IDAHO  
APPELLATE RULE 12**

The Plaintiff City of Meridian ("Plaintiff" or "City"), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., hereby submits its Reply Memorandum in Support of Plaintiff's Motion for Order Approving Permission to Appeal from an Interlocutory Order, Pursuant to Idaho Appellate Rule 12. Contrary to the assertions of the Defendant Petra, Incorporated ("Defendant" or "Petra"), this matter does present a case of controlling law upon which there is a substantial ground for difference of opinion, which if resolved by the Idaho Supreme Court would materially advance a more orderly resolution of this case.

## ARGUMENT

### A. **The Issues Presented by the City's Motion to Dismiss Do Present Controlling Issues of Law as to Which There Is Substantial Grounds for Difference of Opinion.**

As this Court is aware from the substantial briefing provided thus far in this case, and as it relates to Petra's counterclaim in this matter, Petra seeks additional compensation purportedly arising from the performance of its fiduciary duties arising under the Construction Management Agreement ("CMA") with the City. More specifically however, Petra's claim for additional compensation is grounded in its assertion that it is entitled to additional compensation based on overall increased costs of construction, an increased cost of construction which Petra was aware of at least as early as January of 2007 when it submitted its first of a series of cost estimates to the City. Yet as the construction process progressed and as Petra continued to provide the City with estimates of the increased costs of the overall construction, Petra never once adjusted the construction management fee it would seek. As Petra has argued, and thus conceded, it was not until well over a year later, in April of 2008 ("Change Order #2), that Petra first submitted its claim for additional compensation.

This fact was significant to the City's Motion to Dismiss pursuant to the Idaho Tort Claims Act, I.C. § 50-219 ("ITCA") and is particularly significant to the present request for an order granting the City's permissive appeal. This Court's denial of the City's motion was expressly premised upon the conclusion that Petra's claim did not accrue until February of 2009 because that was the date, according to Petra's view of the evidence, that the City first denied its claim for additional compensation. Putting aside the City's dispute with that particular characterization of the evidence, what cannot be disputed is that there is a substantial dispute between the parties as to when a cause of action accrues for the purpose of triggering the notice provisions of the ITCA.



According to Petra's argument, it could wait well over a year after having possession of facts that would, under its interpretation of the provisions of the CMA, give rise to grounds to seek additional compensation from the City. In essence, Petra's argument allows it to wholly control its own limitation period regardless of when the facts giving rise to its claim arose. While it is true that there are a number of cases which address the application of the notice provisions of the ITCA, Petra must concede that none of those appellate decisions address the specific issue presented here. There is no Idaho case which addresses when the notice provision of the ITCA is triggered in a contract action between a contractor and a municipality, particularly where the contract between the two expressly provides the time frame and procedure for the assertion of a claim under the contract, as is the case in the CMA here. Nonetheless, it is clear from prior Idaho cases that there is no support for Petra's position that it, and it alone, can control when its claim for purposes of the ITCA accrues. See *Mitchell v. Bingham Memorial Hosp.*, 130 Idaho 420, 423, 942 P.2d 544, 547 (1997) (stating "a claimant is not required to know all the facts and details of a claim because such a prerequisite would allow a claimant to delay completion of their investigation before triggering the notice requirement."); *Magnuson Properties Partnership v. City of Coeur d'Alene*, 138 Idaho 166, 59 P.3d 971 (2002) (stating that "the 180-day notice period begins to run at the occurrence of a wrongful act, even if the extent of damages is not known or is unpredictable at the time.").

Moreover, while apparently not a basis for this Court's determination, a substantial amount of briefing between the parties was devoted to the issue of whether or not a counterclaim of the nature asserted by Petra in this matter obviates the need for pre-suit notification under the ITCA. It is clear that there is no Idaho case law on that subject. *Harms Memorial Hosp. v. Morton*, 112 Idaho 129, 730 P.2d 1049 (Ct. App. 1986).

Thus, the two issues presented by way of the City's Motion to Dismiss are issues which concern controlling questions of law as to which there is substantial ground for difference of

opinion. Thus the City has satisfied the criteria set forth by Idaho Appellate Rule 12 for permission to appeal to the Idaho Supreme Court.

**B. The Grant of the City's Motion Would Advance the Orderly Resolution of the Case.**

While it is not disputed that the dismissal of Petra's Counterclaims would not terminate this litigation in its entirety, it would materially advance the orderly and efficient resolution of this litigation. The City commenced this action based on Petra's failure to perform in accordance with those express fiduciary duties and obligations which it agreed to perform in its capacity as the construction manager for the Meridian City Hall. The City's claims for contract damages and construction defects would continue regardless of whether or not Petra is entitled to present its claims for additional compensation from the City as alleged in its counterclaim.

However, the dismissal of Petra's claims would greatly streamline the issues presented in these proceedings, thus significantly reducing the nature and duration of trial. This is certainly a not inconsequential result given, as Petra recently noted, the "significant legal expenses" (in excess of \$1 million) that Petra and the taxpayers of the City of Meridian have had to incur and will be required to incur. *See Petra's Memorandum in Support of Motion in Limine to Exclude Testimony and Documents Regarding Meridian's Claimed Damages*, page 11. Moreover, an immediate appeal will not only save the parties tremendous expense, it will also reduce the impact upon the employees of Petra and the City, as well as other third party witnesses.

Accordingly, the grant of an immediate appeal as requested by the City would advance the orderly resolution of this case.

## CONCLUSION

For the reasons set forth above, the City respectfully request that this Court grant it permission to appeal the Order denying the City's Motion to Dismiss Petra's Counterclaim to the Idaho Supreme Court.

DATED this 3 day of November, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.

By: 

Daniel Loras Glynn  
Attorneys for Plaintiff

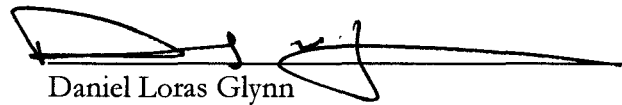
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 2 day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
P.O. Box 9518  
Boise, ID 83707-9518  
Fax: (208) 639-5609

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<input type="checkbox"/>
<input type="checkbox"/>

  
Daniel Loras Glynn

NOV 04 2010

**KIM J. TROUT, ISB #2468**  
**DANIEL LORAS GLYNN, ISB #5113**  
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.  
225 North 9th Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701  
Telephone: (208) 331-1170  
Facsimile: (208) 331-1529

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

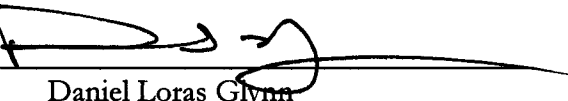
**PLAINTIFF'S MOTION TO DISMISS  
DEFENDANT'S CLAIM FOR LOST  
PROFITS AND/OR BUSINESS  
DEVASTATION PURSUANT TO THE  
IDAHO TORT CLAIMS ACT**

COMES NOW Plaintiff the City of Meridian, by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., and hereby moves this Court to dismiss, pursuant to Rule 12(b)(6), Petra, Incorporated's (hereafter "Petra") claim for lost profits and/or business devastation. This motion is supported by the Memorandum in Support of Plaintiff's Motion to Dismiss and the Affidavit of Daniel Loras Glynn filed concurrently herewith, and the pleadings and papers on file in this matter.

Oral argument is requested.

DATED this 4<sup>th</sup> day of November, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.

By:   
Daniel Loras Glynn  
Attorneys for Plaintiff


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 4<sup>th</sup> day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSH O HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
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Boise, ID 83707-9518  
Fax: (208) 639-5609

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Daniel Loras Glynn

NOV 04 2010

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

KIM J. TROUT, ISB # 2468  
DANIEL LORAS GLYNN, ISB # 5113  
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.  
225 North 9th Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701  
Telephone: (208) 331-1170  
Facsimile: (208) 331-1529

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S MOTION TO DISMISS  
DEFENDANT'S CLAIM FOR LOST  
PROFITS AND/OR BUSINESS  
DEVASTATION PURSUANT TO THE  
IDAHO TORT CLAIMS ACT

COMES NOW the Plaintiff City of Meridian ("Plaintiff" or "City"), by and through its counsel of record, the law firm of Trout Jones Gledhill Fuhrman Gourley, P.A., and hereby submits the following Memorandum in Support of Plaintiff's Motion to Dismiss Defendant Petra, Incorporated's ("Defendant" or "Petra") Claim for Lost Profits and/or Business Devastation Pursuant to the Idaho Tort Claims Act.

I. INTRODUCTION

At the outset, it is important to clarify and distinguish the City's present motion from the Motion to Dismiss (Pursuant to the Idaho Tort Claims Act) filed on August 17, 2010. The first Motion to Dismiss (Idaho Tort Claims Act), wherein the City has sought permission to appeal the

Court's denial to the Idaho Supreme Court, sought to dismiss Petra's then-known counterclaims against the City as set forth in the Change Order No. 2 Request, dated October 3, 2008 and prepared by Gene Bennett, wherein Petra sought increased management fees in the amount of \$512,427.00.

The present Motion to Dismiss is being brought by the City in response to Petra's newly alleged claim of lost profits and/or business devastation. Not only has Petra clearly failed to provide the City with proper notice of the lost profits and/or business devastation claim pursuant to the requirements of the Idaho Tort Claims Act, I.C. § 6-901 *et seq.* ("ITCA"), Petra has failed to even allege this claim in its Counterclaim, Amended Counterclaim filed on August 21, 2009, or in response to discovery requests from the City regarding Petra's alleged damages. Instead, the first disclosure of the nature, breadth and scope of a claim for lost profits and/or business devastation until the Keith Pinkerton expert report received by the City on October 22, 2010, which attempts to set forth and quantify Petra's lost profits and/or business devastation claim in the amount of 3.9 to 4.2 million dollars.

Accordingly, in view of the fact that Petra did not serve a notice of claim upon the City within 180 days from the date that the lost profits and/or business devastation claim against the City arose, or reasonably should have been known, Petra's claim must be dismissed for failure to state a claim upon which relief can be granted.

## II. ARGUMENT

### **Petra's Claim for Lost Profits and/or Business Devastation Against the City Must be Dismissed With Prejudice in View of Petra's Failure to Properly and Timely Provide the City with Notice of Such a Claim in Accordance with the ITCA.**

Municipal corporations like the City are entitled to pre-suit notice under the ITCA. This requirement is found within Idaho Code § 50-219, which requires that "[a]ll claims for damages against a city must be filed as prescribed by [the ITCA]." I.C. § 50-219. *See also, Sweitzer v Dean*, 118



Idaho 568, 798 P.2d 27 (1990) (stating that I.C. § 50-219 clearly intended to make “filing procedures for all claims against a municipality uniform, standard and consistent.”); *Scott Beckstead Real Estate Company v City of Preston*, 147 Idaho 852, 856, 216 P. 3d 141, 145 (2009). Thus, “[n]otice of a claim for damages against a city, whether grounded in tort, contract or otherwise, falls under the ‘all claims’ language of I.C. § 50-219.” *Cox v City of Sandpoint*, 140 Idaho 127, 131, 90 P.3d 352, 356 (2003).

“[I]t is clear that failure to comply with the notice requirement bars a suit regardless of how legitimate it might be.” *Driggers v Grafe*, 148 Idaho 295, 297, 221 P.2d 521, 523 (Ct. App. 2009). See also, *Bryant v City of Blackfoot*, 137 Idaho 307, 48 P.3d 636 (2002); *Mallory v City of Montpelier*, 126 Idaho 446, 885 P.2d 1162 (Ct. App. 1994); *McQuillen v City of Ammon*, 113 Idaho 719, 747 P.2d 741 (1987); *Ouerman v Klien*, 103 Idaho 795, 654 P.2d 888 (1992). Accordingly, in all actions against a governmental entity such as the City here, the party asserting a claim must both plead and prove that he or she has complied with the requirements of the ITCA. *Pounds v Dennison*, 120 Idaho 425, 816 P.2d 982 (1991) (summary judgment was proper as plaintiff had failed to make a showing sufficient to establish the existence of an element essential to her case on which she bore the burden of proof, i.e. compliance with ITCA).

Pursuant to I.C. § 6-907, a notice of claim must:

[A]ccurately describe the conduct and circumstances which brought about the injury or damage, describe the injury or damage, state the time and place the injury or damage occurred, state the names of all persons involved, if known, and shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six (6) months immediately prior to the time the claim arose.

I.C. § 6-907.

Petra failed to provide notice to the City as required by the ITCA.

On May 6, 2009, Petra filed its original Answer and Counterclaim in this matter. Petra’s Counterclaim does not contain any claim for lost profits and/or business devastation. On August

21, 2009, Petra filed its Amended Counterclaim in this matter, which also does not contain any claim for lost profits and/or business devastation.

In this regard it should be noted that on July 22, 2009, the City propounded discovery requests upon Petra, including Interrogatory No. 32, which stated:

**INTERROGATORY NO. 32:** Please set forth and describe with particularity each fact that supports your claim for any damages in this matter, including how you arrived at these damages, the calculation for the same, and identify any and all documents that support your claim for damages.

(Affidavit of Daniel Loras Glynn in Support of Second Motion to Dismiss ("Glynn Aff."), Exhibit "A".)

On August 24, 2009, the City received Petra's response to Interrogatory No. 32, which stated:

RESPONSE: See Change Order No.2 Request, dated 10/3/08 prepared by Gene Bennett.<sup>1</sup>

(Glynn Aff., Exhibit "B".)

Petra has not supplemented its response to Interrogatory No. 32. (Glynn Aff., ¶4.)

On October 22, 2010, Petra provided the City with an expert report from Keith A. Pinkerton, wherein Petra, for the first time, provided any detail concerning a claim for lost profits and/or business devastation in an amount of 3.9 to 4.2 million dollars. (Glynn Aff., Exhibit "C".) Significantly, and as set forth in the expert report *provided by Petra*, the lost profits and/or business devastation claim arose immediately upon the City's filing of the Complaint in this matter on April 16, 2009.

Thus, according to Petra's own expert report, Petra has known or should have known about this lost profits and/or business devastation claim since April 16, 2009. Accordingly, Petra was

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<sup>1</sup> Change Order No. 2 sought payment in the amount of \$512,427.00 for an alleged increase in the management time and management fee on the project.

required to provide the City with proper notice of Petra's claim no later than October 19, 2009. *See Mitchell v Bingham Memorial Hosp.*, 130 Idaho 420, 423, 942 P.2d 544, 547 (1997) (stating "a claimant is not required to know all the facts and details of a claim because such a prerequisite would allow a claimant to delay completion of their investigation before triggering the notice requirement."); *Magnuson Properties Partnership v City of Coeur d'Alene*, 138 Idaho 166, 59 P.3d 971 (2002) (stating that "the 180-day notice period begins to run at the occurrence of a wrongful act, even if the extent of damages is not known or is unpredictable at the time.").


Petra, however, did not even allege its claim for lost profits and/or business devastation until producing the expert report on October 22, 2010, more than a year of the deadline *mandated* by the ITCA. As the Court is well aware, failure to comply with the notice requirement of the ITCA bars Petra's claim. Therefore, Petra's claim for lost profit and/or business devastation fails to state a claim upon which relief can be granted and should be dismissed with prejudice.

### III. CONCLUSION

It is undisputed, and undisputable, that Petra wholly failed to plead, or comply with the ITCA and I.C. § 50-219 in regard to its claim for lost profit and/or business devastation. As such, these claims must be dismissed with prejudice.

DATED this 4<sup>th</sup> day of November, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
GOURLEY, P.A.

By:   
Daniel Loras Glynn  
Attorneys for Plaintiff

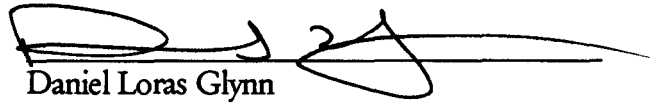
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 4<sup>th</sup> day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSH O HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
P.O. Box 9518  
Boise, ID 83707-9518  
Fax: (208) 639-5609

Hand Delivered  
U.S. Mail  
Fax  
Fed. Express  
Email

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<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

  
Daniel Loras Glynn



Please set forth and describe with particularity each fact that supports your claim for any damages in this matter, including how you arrived at these damages, the calculation for the same, and identify any and all documents that support your claim for damages."

Attached hereto as Exhibit "A" is a true and correct copy of Interrogatory No. 32 served upon Petra Incorporated on July 22, 2009.

3. On August 21, 2009 Petra, Incorporated served, by mail, Petra Incorporated Response Dated August 21, 2009 to the City of Meridian's First Set of Interrogatories, Requests for Production of Documents and Request for Admissions to Defendant Petra Incorporated. Petra responded to Interrogatory No. 32 by stating: "See Change Order No. 2 Request, dated 10/3/08 prepared by Gene Bennett." Attached hereto as Exhibit "B" is a true and correct copy of Petra's response to Interrogatory No. 32, and the verification page signed by Jerry Frank.

4. I have reviewed Petra's Supplemental Responses and have determined that Petra has not supplemented its response to Interrogatory No. 32.

5. On October 22, 2010, Petra provided the City with an expert report from Keith A. Pinkerton, wherein Petra, for the first time, provided any detail concerning a claim for lost profits and/or business devastation in an amount of 3.9 to 4.2 million dollars. Attached hereto as Exhibit "C" is a true and correct copy of the report from Keith A. Pinkerton.

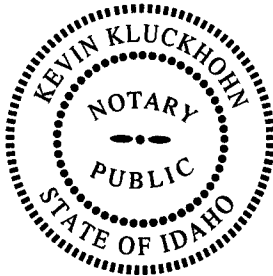
FURTHER YOUR AFFIANT SAYETH NAUGHT.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
GOURLEY, P.A.

By:

  
Daniel Loras Glynn

Subscribed and sworn to before me this 4<sup>th</sup> day of November, 2010.



A handwritten signature of the Notary Public, Kevin Kluckhohn, written in black ink.

Notary Public, State of Idaho  
Residing at: Meridian, ID  
My commission expires: November 3, 2014

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 4<sup>th</sup> day of November, 2009, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSH O HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P.O. Box 9518  
Boise, Idaho 83707-9518  
Direct Facsimile: (208) 639-5609

Hand Delivered  
U.S. Mail  
Fax  
Email

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<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

A handwritten signature of Kim J. Trout, written in black ink.  
Kim J. Trout

ORIGINAL

**KIM J. TROUT, ISB #2468**  
**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.**  
225 North 9th Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701  
Telephone: (208) 331-1170  
Facsimile: (208) 331-1529

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**PLAINTIFF THE CITY OF MERIDIAN  
FIRST SET OF INTERROGATORIES,  
REQUESTS FOR PRODUCTION OF  
DOCUMENTS AND REQUEST FOR  
ADMISSIONS TO DEFENDANT PETRA  
INCORPORATED**

Plaintiff, by and through its counsel of record, Trout Jones Gledhill Fuhrman, P.A., and pursuant to Rules 26, 33, 34, and 36 of the Idaho Rules of Civil Procedure and in accordance with the definitions and instructions set forth below, requests that the Defendant, Petra, Incorporated, (hereinafter "Petra" or "Defendant"), answer the following Interrogatories, Requests for Production of Documents, and Requests for Admissions in writing, under oath, and within thirty (30) days. These Requests are continuing in nature and require supplementation pursuant to Idaho Rule of Civil Procedure Rule 26(e), anytime before trial, and in no event later than 45 days before trial.

**PLAINTIFF THE CITY OF MERIDIAN FIRST SET OF INTERROGATORIES, REQUESTS FOR  
PRODUCTION OF DOCUMENTS AND REQUEST FOR ADMISSIONS TO DEFENDANT PETRA  
INCORPORATED - 1**

**EXHIBIT**

tabbies  
006745



recommendations to Owner and Architect as to the constructability, cost-effectiveness, clarity, consistency and coordination of Construction Documents.

**INTERROGATORY NO. 30:** Please list any and all services, including but not limited to, the date(s), name of person(s) performing service and description(s) of said services performed by Petra or Petra's agents in compliance with Article 4.5.8 of the Agreement as the preparation of value analysis studies on major construction components.

**INTERROGATORY NO. 31:** Please list any and all services, including but not limited to, the date(s), name of person(s) performing service and description(s) of said services performed by Petra or Petra's agents identified as "general conditions" specifically identified as items designated for procurement by the Construction Manager in the Construction Management Plan

**INTERROGATORY NO. 32:** Please set forth and describe with particularity each fact that supports your claim for any damages in this matter, including how you arrived at these damages, the calculation for the same, and identify any and all documents that support your claim for damages.

**INTERROGATORY NO. 33:** Please set forth and describe with particularity each fact, document, and correspondence that Petra contends, if any, that Petra examined the Plaintiff's Criteria, prepared and submitted to Plaintiff a written report as required by Article 4.2 of the Agreement.

**INTERROGATORY NO. 34:** Please set forth and describe with particularity each fact and document, including but not limited to the date(s) and description(s) of services performed by Petra or Petra's agents in compliance with Article 4.4 of the Agreement, specifically the creation and submission of the Construction Management Plan.

**INTERROGATORY NO. 35:** Please set forth and describe with particularity each fact and document, including but not limited to the date(s) and description(s) of services performed by Petra


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 22<sup>nd</sup> day of July, 2009, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
P.O. Box 9518  
Boise, ID 83707-9518  
Fax: (208) 639-5609

Hand Delivered  
U.S. Mail  
Fax  
Fed. Express  
Email

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\_\_\_\_\_  
Kim J. Trout

AUG 24 2009

ORIGINAL

Thomas G. Walker (ISB 1856)  
Mackenzie Whatcott (ISB 5509)  
COSH O HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: twalker@cosholaw.com; mwhatcott@cosholaw.com

Attorneys for Defendant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant.

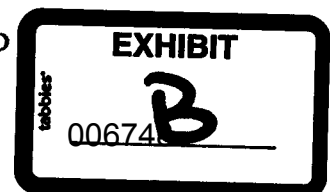
Case No. CV OC 0907257

**PETRA INCORPORATED RESPONSE  
DATED AUGUST 21, 2009 TO THE CITY  
OF MERIDIAN'S FIRST SET OF  
INTERROGATORIES, REQUESTS FOR  
PRODUCTION OF DOCUMENTS AND  
REQUEST FOR ADMISSIONS TO  
DEFENDANT PETRA INCORPORATED**

Petra Incorporated ("Petra"), by and through its undersigned counsel, pursuant to Rules 33, 34 and 36 of the Idaho Rules of Civil Procedure, responds to Plaintiffs City of Meridian's (Meridian) First Set of Interrogatories, Requests for Production of Documents and Requests for Admissions, served on or about July 22, 2009 as follows:

PETRA INCORPORATED RESPONSE DATED AUGUST 21, 2009 TO THE CITY OF  
MERIDIAN'S FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION  
OF DOCUMENTS AND REQUEST FOR ADMISSIONS TO DEFENDANT PETRA INCORPORATED

Page 1



building be raised 4 feet to eliminate that risk (letter 4/3/07). City Council approved the value engineering suggestion and the drawings were modified to raise the building 4' (letter 4/12/07).

- **Bi-Weekly Meetings June/July/August 2007**

Numerous value engineering suggestions were pursued during the months of June, July, and August 2007 (see attached correspondence to subcontractors). These were summarized and given to City Council (see attachment 8/31/07). Three of the items were selected (see Mtg#74 - 9/17/07).

**INTERROGATORY NO. 31:** Please list any and all services, including but not limited to, the date(s), name of person(s) performing service and description(s) of said services performed by Petra or Petra's agents identified as "general conditions" specifically identified as items designated for procurement by the Construction Manager in the Construction Management Plan.

**RESPONSE:** See response to Interrogatory No. 5 for documentation of performance under General Conditions.

**INTERROGATORY NO. 32:** Please set forth and describe with particularity each fact that supports your claim for any damages in this matter, including how you arrived at these damages, the calculation for the same, and identify any and all documents that support your claim for damages.

**RESPONSE:** See Change Order No. 2 Request, dated 10/3/08 prepared by Gene Bennett.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY That on the 21<sup>st</sup> day of August, 2009 a true and correct copy of the  
within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☐ Facsimile:  
☐ E-mail:

  
THOMAS G. WALKER

VERIFICATION

STATE OF IDAHO )  
 )ss.  
County of Ada )


Jerry Frank, being first duly sworn on oath, deposes and says:

That he is the President of the Defendant Petra Incorporated in the above-entitled action;  
that he has read the foregoing Response to Plaintiff's First Set of Interrogatories, Requests for  
Production of Documents and Request for Admissions, that by his own personal knowledge he  
knows the contents thereof; and, that the facts therein stated are true, correct and accurate to the  
best of his knowledge and belief.

  
JERRY FRANK

SUBSCRIBED AND SWORN to before me this 31<sup>st</sup> day August, 2009.

MY COMMISSION EXPIRES  
October 10, 2013  
BONDED THRU NOTARY PUBLIC UNDERWRITERS

  
NOTARY PUBLIC For Idaho  
Residing at Boise, Idaho  
My Commission Expires: 10/10/2013

**PRELIMINARY EXPERT WITNESS REPORT**

**City of Meridian**

**v.**

**Petra, Inc.**

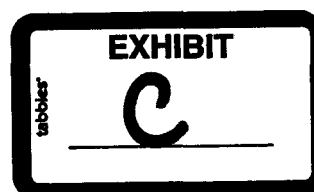
**Prepared by:**

**Hooper Cornell, PLLC  
250 Bobwhite Court, Suite 300  
Boise, Idaho 83706**

**Prepared for:**

**Cosho Humphrey LLP**

**October 19, 2010**



**HOOPER CORNELL**

**PETRA97106  
006752**

October 20, 2010

Mr. Thomas G. Walker, Esq.  
Cosho Humphrey, LLP  
800 Park Blvd., Suite 790  
PO Box 9518  
Boise, ID 83707-9518

RE: City of Meridian v. Petra, Inc.

Dear Mr. Walker:

At your request, I have reviewed the facts and circumstances surrounding the counterclaim asserted by Petra, Inc., (Petra) in the matter cited above to quantify corresponding economic damages. This report is intended to summarize the analyses performed and illustrate the conclusions reached.

In performing this assignment, I assumed that Petra will prevail in its legal theories of this case. Accordingly, this report should not be construed to contain any opinions with regard to Defendant's liability.

#### Data Considered

During the course of this engagement, I reviewed relevant data obtained from the following sources: (1) building permit data from all of the incorporated entities in Ada and Canyon counties except for the municipalities of Notus and Greenleaf; (2) audited financial statements of Petra, Inc.; and (3) various legal filings associated with this case. In addition, I have had discussions with management of Petra and its advisors.

#### Methodology

To quantify damages, I used available data to estimate the magnitude of the nonresidential construction market in Ada and Canyon counties. I then coupled this information with data obtained from Petra to estimate its share of that market by year from 2003 forward. By comparing Petra's results in the marketplace both before and after the alleged wrongful acts of the City of Meridian, I was able to estimate the present value of lost profits incurred by Petra, Inc.

I also constructed a parallel analysis using the same input data and applying a technique known as Monte Carlo Simulation. This technique provides an alternative method of eliminating uncertainty through the use of statistics.

Both methods of analysis produce similar results and were designed to quantify damages with a reasonable degree of economic certainty; all of my conclusions are expressed on that basis.



**Professional Qualifications**

A listing of my professional qualifications and prior testimony are attached to this report.

**Professional Billing Rates**

Hooper Cornell's hourly rates currently range from \$60 per hour for clerical staff to \$300 per hour for senior partners. My personal billing rate in effect for this assignment is \$285 per hour.

**Conclusions**

Based on the methods described above and as shown in additional detail on the accompanying schedules, it is my opinion that the present value of the economic damages incurred by Petra is between \$3.9 million and \$4.2 million.

Sincerely,

A handwritten signature in black ink, appearing to read "Keith A. Pinkerton", with a stylized, cursive script.

Keith A. Pinkerton  
Director of Valuation Services

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## Schedules

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City of Meridian v. Petra Inc.  
Building Permit Data

Schedule 1

All Permits	2004	2005	2006	2007	2008	2009	6/30/2010
Ada County	\$276,717,503	\$396,314,708	\$314,126,706	\$251,938,333	\$133,067,072	\$145,374,737	\$24,675,686
Boise	\$335,082,510	\$498,018,247	\$494,886,270	\$541,190,848	\$332,881,239	\$213,843,043	\$95,489,621
Eagle	\$174,695,084	\$202,219,100	\$126,409,103	\$75,805,586	\$52,420,410	\$14,018,085	\$23,591,918
Garden City	\$20,419,437	\$18,389,338	\$27,982,000	\$32,122,780	\$18,174,358	\$5,881,271	\$3,998,425
Meridian	\$559,803,356	\$750,775,839	\$531,412,665	\$334,846,565	\$285,537,421	\$203,540,987	\$94,572,939
Kuna	\$36,283,523	\$97,258,749	\$73,133,477	\$53,298,816	\$56,987,461	\$42,602,653	\$21,336,571
Star	\$210,097	\$86,673,420	\$81,164,266	\$35,155,732	\$12,232,914	\$5,339,201	\$12,883,267
Canyon County	\$114,862,336	\$148,883,412	\$128,435,850	\$86,675,060	\$37,820,892	\$36,431,143	\$10,005,160
Caldwell	\$106,269,332	\$172,161,313	\$183,493,482	\$138,842,255	\$101,420,462	\$44,506,661	\$27,738,585
Nampa	\$208,000,000	\$305,000,000	\$334,000,000	\$161,000,000	\$100,000,000	\$46,000,000	\$28,400,218
Notus							
Greenleaf							
Parma	\$1,828,065	\$5,998,269	\$1,439,322	\$3,355,955	\$1,447,148	\$1,381,559	
Melba	\$100,768	\$548,177	\$202,644	\$645,847	\$252,730	\$52,096	
Middleton	\$11,911,908	\$31,990,506	\$40,612,129	\$24,864,565	\$20,308,746	\$47,774,268	\$7,010,217
Wildor	\$314,212	\$2,719,914	\$3,379,639	\$1,608,794	\$408,065	\$4,657,960	\$1,222,800
<b>Total</b>	<b>\$1,846,488,184</b>	<b>\$2,786,888,884</b>	<b>\$2,348,677,553</b>	<b>\$1,741,384,136</b>	<b>\$1,152,968,948</b>	<b>\$811,488,884</b>	<b>\$261,884,487</b>

Residential Permits	2004	2005	2006	2007	2008	2009	6/30/2010
Ada County	\$233,623,863	\$316,769,821	\$258,819,048	\$157,358,634	\$86,642,101	\$45,117,752	\$20,073,287
Boise	\$128,056,970	\$196,539,590	\$183,487,989	\$166,108,388	\$50,331,483	\$30,539,736	\$32,323,477
Eagle	\$157,589,353	\$181,206,711	\$82,361,699	\$39,668,128	\$29,413,624	\$12,583,499	\$16,501,717
Garden City	\$0	\$11,660,490	\$13,435,553	\$21,306,321	\$11,413,162	\$753,007	\$1,933,300
Meridian	\$455,091,820	\$616,965,501	\$344,223,861	\$198,490,581	\$150,559,837	\$129,177,240	\$72,302,915
Kuna	\$31,796,898	\$87,809,540	\$63,598,738	\$45,204,132	\$46,421,396	\$42,770,063	\$14,342,552
Star	\$24,732,762	\$97,237,278	\$55,848,275	\$29,132,926	\$5,718,489	\$4,272,103	\$7,683,297
Canyon County	\$90,306,221	\$121,002,724	\$106,846,644	\$52,869,413	\$28,442,712	\$9,949,862	\$4,185,211
Caldwell	\$70,068,467	\$122,477,528	\$142,558,825	\$96,400,983	\$27,239,141	\$23,695,249	\$12,878,350
Nampa	\$161,238,871	\$201,369,462	\$188,508,219	\$48,068,051	\$27,700,866	\$8,515,212	\$6,670,091
Notus							
Greenleaf							
Parma	\$134,256	\$1,350,000	\$840,000	\$2,553,080	\$494,732	\$342,616	\$152,778
Melba	\$0	\$552,165	\$186,000	\$440,763	\$201,906	\$0	\$0
Middleton	\$13,151,362	\$25,324,336	\$36,215,791	\$11,500,213	\$16,288,418	\$6,834,632	\$5,221,523
Wildor	\$0	\$0	\$0	\$1,324,397	\$371,664	\$138,502	\$0
<b>Total</b>	<b>\$1,385,798,948</b>	<b>\$1,988,384,346</b>	<b>\$1,486,948,648</b>	<b>\$878,421,908</b>	<b>\$478,388,584</b>	<b>\$214,888,473</b>	<b>\$104,388,488</b>

Non-Residential	2004	2005	2006	2007	2008	2009	6/30/2010
Ada County	\$43,093,640	\$79,544,887	\$55,307,658	\$94,579,699	\$46,424,971	\$100,256,985	\$4,602,399
Boise	\$207,025,540	\$301,478,657	\$311,388,281	\$375,082,460	\$282,549,756	\$183,303,307	\$63,166,144
Eagle	\$17,015,731	\$21,012,389	\$34,047,404	\$36,137,458	\$23,006,786	\$1,434,586	\$7,090,201
Garden City	\$20,419,437	\$6,728,848	\$14,546,447	\$10,816,459	\$6,761,196	\$5,128,264	\$2,065,125
Meridian	\$104,711,536	\$133,810,338	\$187,188,804	\$136,355,984	\$134,977,584	\$74,363,747	\$22,270,024
Kuna	\$4,486,625	\$9,458,209	\$9,534,739	\$8,094,604	\$10,566,065	\$6,994,019	\$6,994,019
Star			\$25,315,991	\$6,022,806	\$6,514,425	\$1,067,098	\$5,199,970
Canyon County	\$24,556,115	\$27,880,688	\$21,589,206	\$33,805,647	\$17,378,180	\$26,481,281	\$5,819,949
Caldwell	\$36,200,865	\$49,683,785	\$40,934,657	\$42,441,272	\$74,181,321	\$20,811,412	\$14,860,235
Nampa	\$46,761,129	\$103,630,538	\$145,491,781	\$112,931,949	\$72,299,134	\$37,484,788	\$21,819,127
Notus							
Greenleaf							
Parma	\$1,693,809	\$4,648,269	\$599,322	\$802,955	\$952,416	\$1,038,943	
Melba	\$100,768		\$16,644	\$205,084	\$50,824	\$52,096	
Middleton		\$6,666,170	\$4,396,338	\$13,364,352	\$4,020,328	\$40,939,636	\$1,788,694
Wildor	\$314,212	\$2,719,914	\$3,379,639	\$284,397	\$36,401	\$4,519,458	\$1,222,800
<b>Total</b>	<b>\$386,379,487</b>	<b>\$747,362,884</b>	<b>\$853,736,961</b>	<b>\$878,925,286</b>	<b>\$678,738,287</b>	<b>\$486,888,884</b>	<b>\$86,888,687</b>

City of Meridian v. Petra Inc.  
Historical Financial Information

	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
Petra Revenue	\$33,059,273	\$47,716,714	\$80,619,217	\$53,205,160	\$50,711,114	\$33,421,638
Other Income	\$4,854	\$8,246	\$7,317	\$30,707	\$23,675	\$4,347
Total Revenue	<u>\$33,064,127</u>	<u>\$47,724,960</u>	<u>\$80,626,534</u>	<u>\$53,235,867</u>	<u>\$50,734,789</u>	<u>\$33,425,985</u>
Direct Costs	<u>\$30,608,998</u>	<u>\$44,857,218</u>	<u>\$76,375,119</u>	<u>\$49,858,440</u>	<u>\$45,981,569</u>	<u>\$30,712,921</u>
Gross Profit	\$2,455,129	\$2,867,742	\$4,251,415	\$3,377,427	\$4,753,220	\$2,713,064
Incremental Costs						
Payroll	\$632,656	\$787,527	\$961,079	\$1,177,545	\$1,234,425	\$803,831
Bad Debt Expense	\$0	\$0	\$0	\$0	\$867,946	\$171,522
Repairs and Maintenance	\$29,548	\$28,142	\$110,878	\$186,930	\$196,051	\$123,843
Travel and Lodging	\$8,055	\$21,061	\$10,606	\$45,006	\$11,437	\$30,638
Auto Expense	\$27,477	\$18,655	\$15,448	\$38,080	\$20,586	\$8,243
Entertainment	\$7,578	\$9,684	\$8,461	\$9,486	\$11,437	\$8,151
Total Incremental Costs	<u>\$785,314</u>	<u>\$865,069</u>	<u>\$1,106,472</u>	<u>\$1,457,046</u>	<u>\$2,341,881</u>	<u>\$1,146,227</u>
Net Incremental Earnings	\$1,749,815	\$2,002,673	\$3,144,943	\$1,920,381	\$2,411,339	\$1,566,837
Incremental Margin	<b>5.29%</b>	<b>4.20%</b>	<b>3.90%</b>	<b>3.61%</b>	4.76%	4.69%
CM Margin	<b>4.89%</b>	<b>2.92%</b>	<b>2.99%</b>	<b>4.88%</b>	4.37%	4.78%

		Contract Revenue		Construction Mgmt	
Non-Residential Construction				CM Cost	
Period	Activity			CM Revenue	Net Thru Petra GL Total CM
2004	\$506,379,407				
2005	\$747,262,691	\$29,121,816		\$5,346,171	\$4,688 \$5,350,859
2006	\$853,736,911	\$47,471,859		\$9,315,265	\$0 \$9,315,265
2007	\$870,925,206	\$31,281,028		\$1,891,747	\$6,675,516 \$8,567,263
2008	\$679,719,387	\$32,472,819		\$1,473,422	\$12,114,577 \$13,587,999
2009	\$496,881,601	\$17,044,396		\$111,484	\$340,206 \$451,690
06/30/10	\$156,898,687				
08/31/10	\$209,198,250	\$6,912,696		\$0	\$115,131 \$115,131
2010*	\$313,797,374	\$10,369,044		\$0	\$172,696 \$172,696
		Market Share		Market Share	
1-Year Lag					
2005	\$506,379,407	\$29,121,816	5.73%		\$5,350,859 1.1%
2006	\$747,262,691	\$47,471,859	6.33%		\$9,315,265 1.2%
2007	\$853,736,911	\$31,281,028	3.60%		\$8,567,263 1.0%
2008	\$870,925,206	\$32,472,819	3.73%		\$13,587,999 1.0%
2009	\$679,719,387	\$17,044,396	2.53%		\$451,690 0.1%
2010	\$496,881,601	\$10,369,044	2.08%		\$172,696 0.0%
6-Mo Lag					
2005	\$626,821,049	\$29,121,816	4.65%		\$5,350,859 0.9%
2006	\$800,499,801	\$47,471,859	5.93%		\$9,315,265 1.2%
2007	\$862,331,058	\$31,281,028	3.63%		\$8,567,263 1.0%
2008	\$775,322,297	\$32,472,819	4.19%		\$13,587,999 1.0%
2009	\$588,300,494	\$17,044,396	2.90%		\$451,690 0.1%
2010	\$405,339,488	\$10,369,044	2.56%		\$172,696 0.0%

\*Annualized

City of Meridian v. Petra Inc.  
Estimation of Lost Market Share

**Contract Projects**

**1-Year Lag**

<u>Petra Market Share</u>	<u>4-Year Average</u>	<u>3-Year Average</u>	<u>2-Year Average</u>
5.75%			
6.35%			6.1%
3.66%		5.26%	
3.73%	4.87%		
2.51%			
2.09%			
Average Less Current	2.79%	3.17%	3.97%

**6-Month Lag**

<u>Petra Market Share</u>	<u>4-Year Average</u>	<u>3-Year Average</u>	<u>2-Year Average</u>
4.65%			
5.93%			5.3%
3.63%		4.73%	
4.19%	4.60%		
2.90%			
2.56%			
Average Less Current	2.04%	2.18%	2.73%
Minimum Lost Share	<u>2.00%</u>		

**Construction Management**

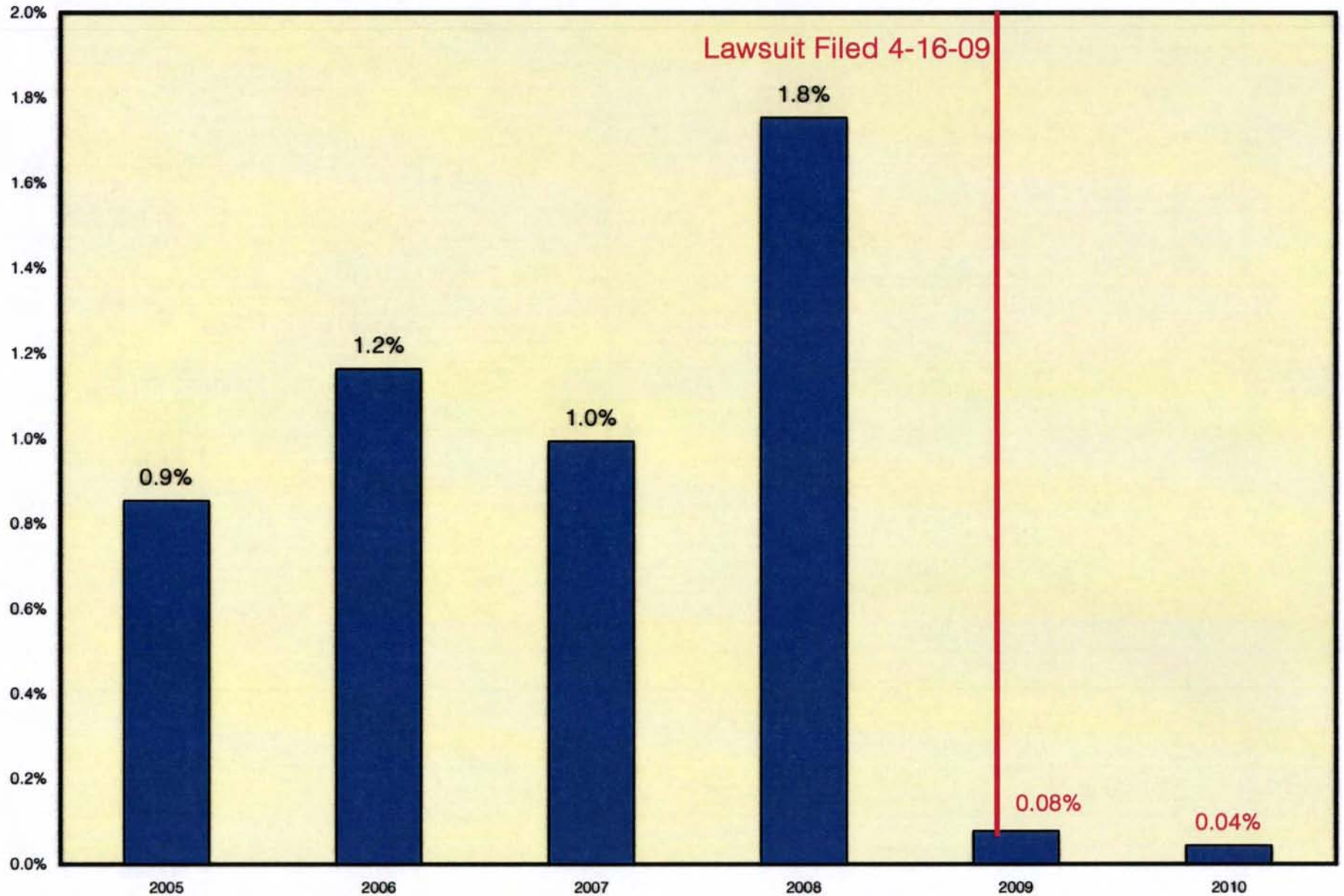
**1-Year Lag**

<u>Petra Market Share</u>	<u>4-Year Average</u>	<u>3-Year Average</u>	<u>2-Year Average</u>
1.06%			
1.25%			1.2%
1.00%		1.10%	
1.56%	1.22%		
0.07%			
0.03%			
	1.18%	1.07%	1.12%

**6-Month Lag**

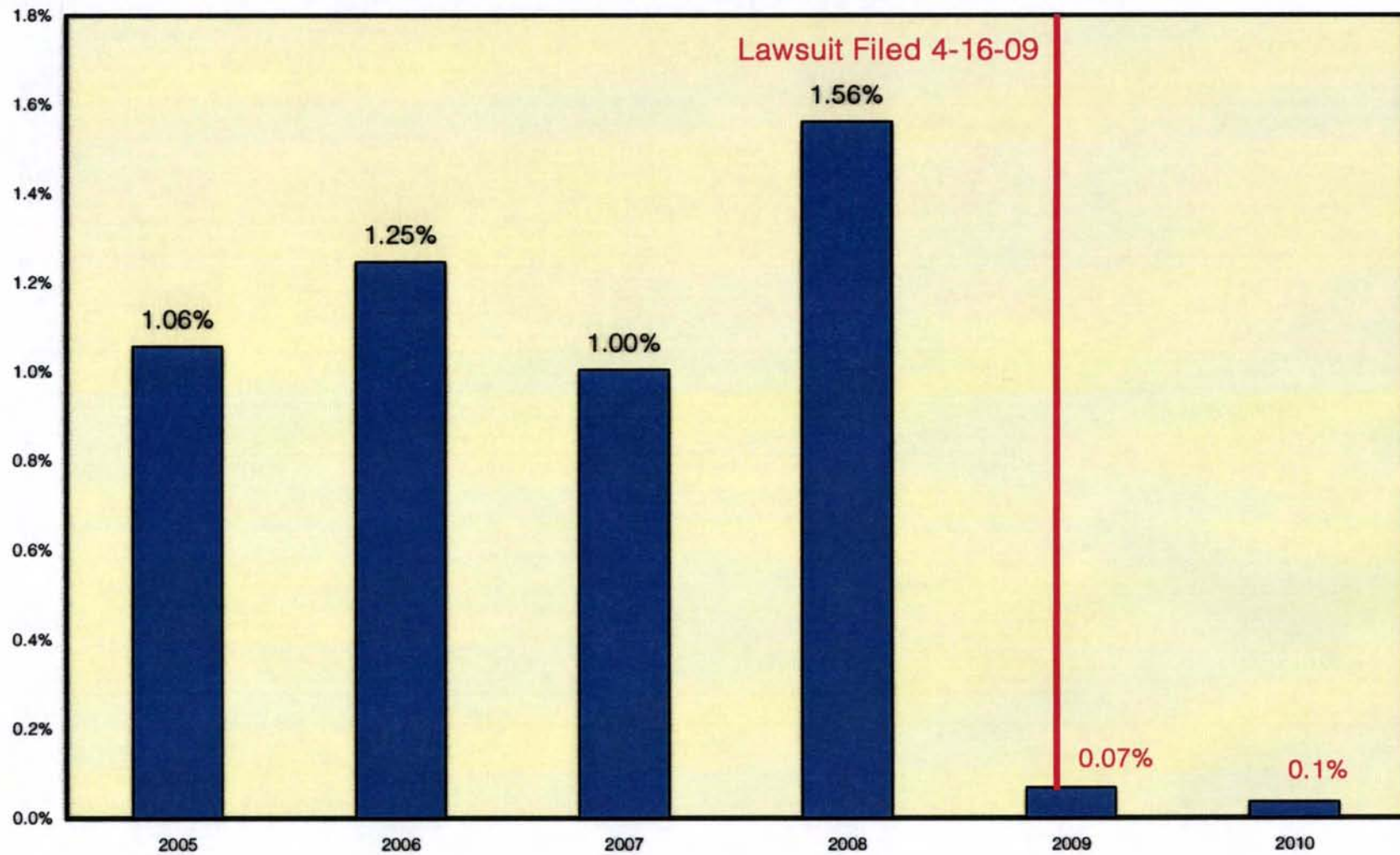
<u>Petra Market Share</u>	<u>4-Year Average</u>	<u>3-Year Average</u>	<u>2-Year Average</u>
0.85%			
1.16%			1.0%
0.99%		1.00%	
1.75%	1.19%		
0.08%			
0.04%			
	1.15%	0.96%	0.97%
	<u>1.00%</u>		

Historical Petra "Market Share" of Construction  
Management Revenue in Ada & Canyon Counties with a 6-Month Lag



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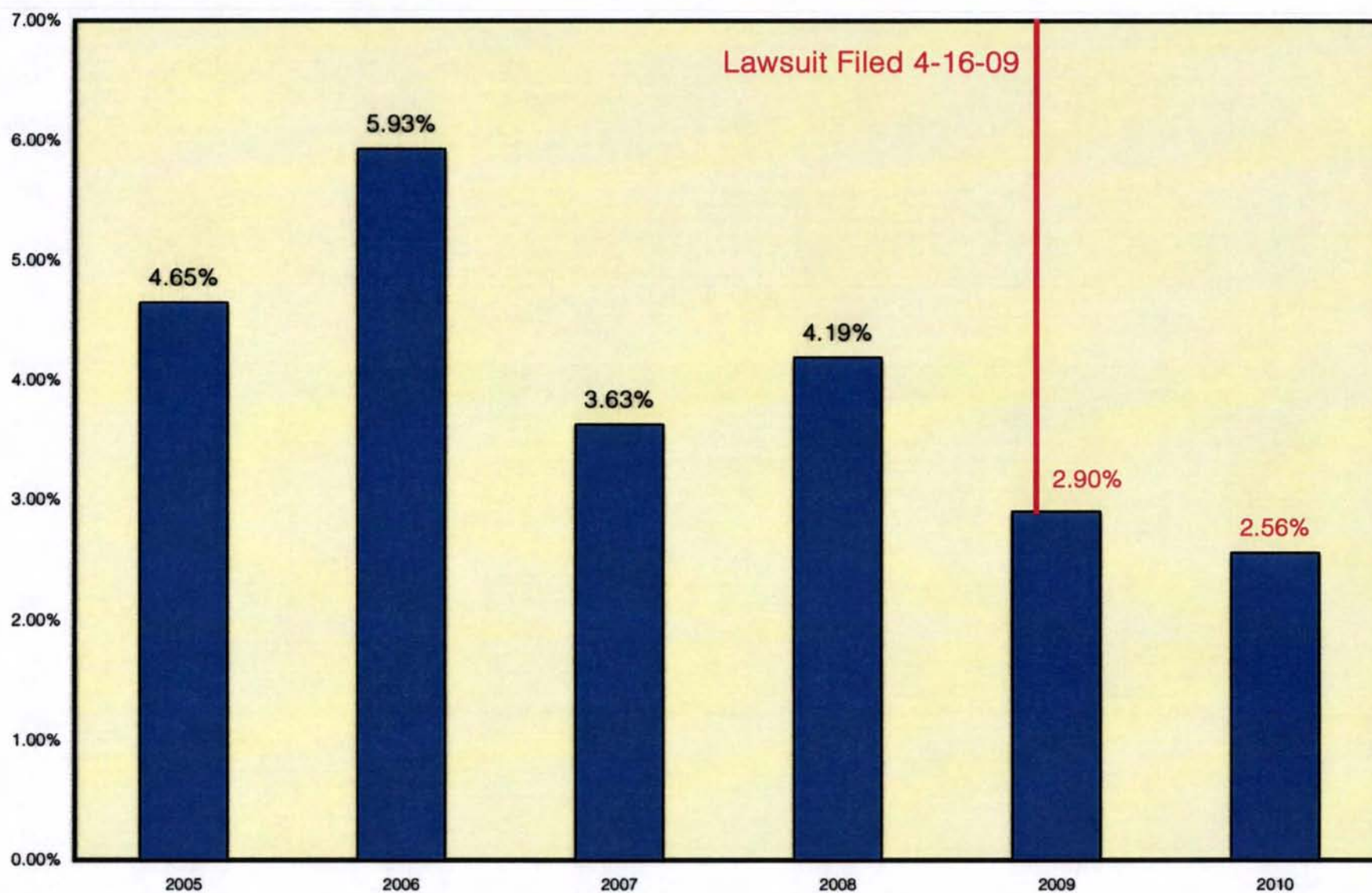
Historical Petra "Market Share" of Construction  
Management Revenue in Ada & Canyon Counties with a 1-Year Lag



006761

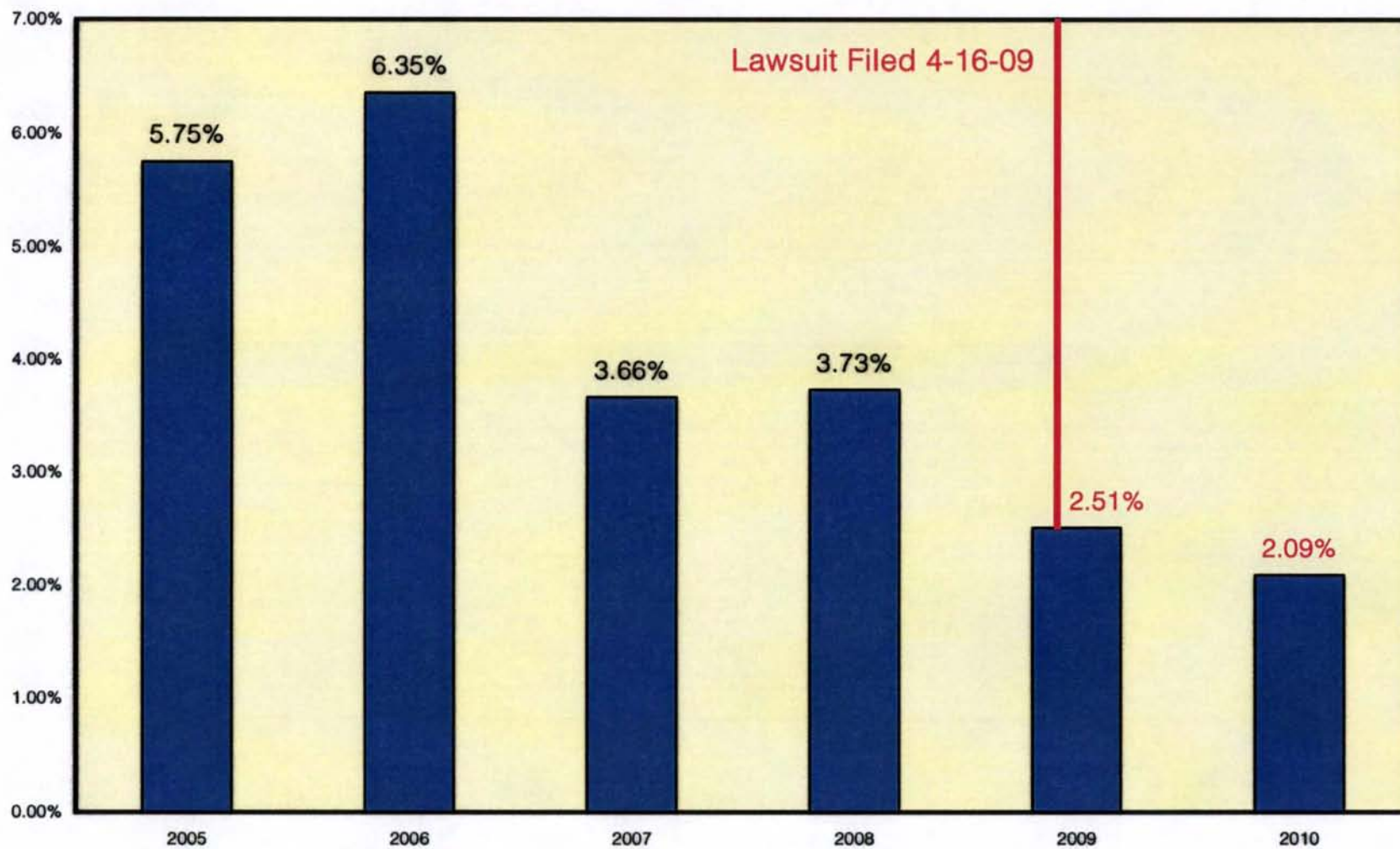


Historical Petra "Market Share" of Contract Revenue  
in Ada & Canyon Counties with a 6-Month Lag



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Historical Petra "Market Share" of Contract Revenue  
in Ada & Canyon Counties with a 1-Year Lag



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City of Meridian v. Petra Inc.  
 Analysis of Cost of Capital using the Build-Up Method  
 as of 10/10/10

Schedule 9

<u>Element</u>	<u>Amount</u>	<u>Source</u>	<u>Notes</u>
Proxy for Risk Free Rate	1.14%	US Federal Reserve	5-Year Constant Maturity Treasury
Intermediate Term Equity Risk Premium	7.20%	Neubotson Associates	Historical Average, 1926-2009
Industry Risk Premium	2.04%	Neubotson Associates	SIC 15
Size Premium	3.99%	Neubotson Associates	Average of 9th and 10th deciles
Company Specific Risk	3.00%	Mooper Cornell	
<b>Estimated Cost of Intermediate Term Equity Capital</b>	<b>17.4%</b>		

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PETRA97118

City of Meridian v. Petra Inc.  
Calculation of Economic Damages--Scenario 1

Schedule 10

<u>Contract Management (CM) Losses</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>	<u>2019</u>	<u>2020</u>
Growth Rate of CM Revenues				1.00%	1.50%	2.00%	2.50%	3.00%	3.00%	3.00%	3.00%	3.00%
Overall Market Activity	\$588,300,494	\$405,339,488	\$315,000,000	\$318,150,000	\$322,922,250	\$329,380,695	\$337,615,212	\$347,743,669	\$358,175,979	\$368,921,258	\$379,988,896	\$391,388,563
Lost Market Share	1.00%	1.00%	1.00%	1.00%	1.00%	1.00%	1.00%	1.00%	1.00%	1.00%	1.00%	1.00%
Lost CM Volume	\$5,883,005	\$4,053,395	\$3,150,000	\$3,181,500	\$3,229,223	\$3,293,807	\$3,376,152	\$3,477,437	\$3,581,760	\$3,689,213	\$3,799,889	\$3,913,886
Historical Average CM Fees	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%
Lost CM Fees	\$264,735	\$182,403	\$141,750	\$143,168	\$145,315	\$148,221	\$151,927	\$156,485	\$161,179	\$166,015	\$170,995	\$176,125
Lost CM Reimbursed Salaries	\$0	\$0	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000
<b>Total CM Losses</b>	<b>\$264,735</b>	<b>\$182,403</b>	<b>\$291,750</b>	<b>\$293,168</b>	<b>\$295,315</b>	<b>\$298,221</b>	<b>\$301,927</b>	<b>\$306,485</b>	<b>\$311,179</b>	<b>\$316,015</b>	<b>\$320,995</b>	<b>\$326,125</b>
<u>Contract Revenue Losses</u>												
Growth Rate of Contract Revenues				1.00%	1.50%	2.00%	2.50%	3.00%	3.00%	3.00%	3.00%	3.00%
Overall Market Activity	\$588,300,494	\$405,339,488	\$315,000,000	\$318,150,000	\$322,922,250	\$329,380,695	\$337,615,212	\$347,743,669	\$358,175,979	\$368,921,258	\$379,988,896	\$391,388,563
Lost Market Share	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%	2.0%
Lost Contract Revenue	\$11,766,010	\$8,106,790	\$6,300,000	\$6,363,000	\$6,458,445	\$6,587,614	\$6,752,304	\$6,954,873	\$7,163,520	\$7,378,425	\$7,599,778	\$7,827,771
Incremental Profit Margin	4.7%	4.7%	4.7%	4.7%	4.7%	4.7%	4.7%	4.7%	4.7%	4.7%	4.7%	4.7%
<b>Total Lost Contract Profits</b>	<b>\$552,002</b>	<b>\$394,009</b>	<b>\$296,500</b>	<b>\$299,004</b>	<b>\$302,947</b>	<b>\$308,640</b>	<b>\$317,308</b>	<b>\$326,899</b>	<b>\$336,885</b>	<b>\$346,785</b>	<b>\$357,389</b>	<b>\$367,806</b>
Increase in Liability Insurance Expense	\$0	\$75,000	\$75,000	\$75,000	\$75,000	\$75,000	\$75,000	\$75,000	\$75,000	\$75,000	\$75,000	\$75,000
<b>Total Nominal Losses</b>	<b>\$617,738</b>	<b>\$638,432</b>	<b>\$662,000</b>	<b>\$667,229</b>	<b>\$673,862</b>	<b>\$682,800</b>	<b>\$694,305</b>	<b>\$708,304</b>	<b>\$722,865</b>	<b>\$737,881</b>	<b>\$753,385</b>	<b>\$769,609</b>
Risk-Adjusted Discount Rate	17.4%											
Present Value Date	10/10/10											
Cash Flow Date		12/31/10	06/30/11	06/30/12	06/30/13	06/30/14	06/30/15	06/30/16	06/30/17	06/30/18	06/30/19	06/30/20
No. of Discount Periods	0	0.22	0.72	1.72	2.72	3.72	4.72	5.72	6.72	7.72	8.72	9.72
Present Value of Nominal Losses	\$617,738	\$545,874	\$500,850	\$486,305	\$465,709	\$436,389	\$406,085	\$382,398	\$356,340	\$328,343	\$298,353	\$267,070
<b>Cumulative Present Value of Losses</b>	<b>\$617,738</b>	<b>\$645,874</b>	<b>\$1,206,534</b>	<b>\$1,712,939</b>	<b>\$2,148,709</b>	<b>\$2,534,992</b>	<b>\$2,892,997</b>	<b>\$3,134,395</b>	<b>\$3,300,634</b>	<b>\$3,504,877</b>	<b>\$3,761,340</b>	<b>\$3,943,310</b>

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PETRA97119

Lost Market Share

Contract Projects			Contract Projects		
Pre-Loss Market Share	Average Post-Loss Market Share	Lost Market Share	Pre-Loss Market Share	Average Post-Loss Market Share	Lost Market Share
5.75%	2.51%	3.24%	1.06%	0.06%	1.00%
6.35%	2.51%	3.84%	1.25%	0.06%	1.19%
3.66%	2.51%	1.15%	1.00%	0.06%	0.95%
3.73%	2.51%	1.22%	1.56%	0.06%	1.51%
4.65%	2.51%	2.13%	0.85%	0.06%	0.80%
5.93%	2.51%	3.42%	1.16%	0.06%	1.11%
3.63%	2.51%	1.12%	0.99%	0.06%	0.94%
4.19%	2.51%	1.68%	1.75%	0.06%	1.70%
	Minimum	1.12%		Minimum	0.80%
	Maximum	3.84%		Maximum	1.70%
	Median	1.90%		Median	1.06%
	Mean	2.22%		Mean	1.15%
	Std Deviation	1.12%		Std Deviation	0.32%
	Normal Distribution			Normal Distribution	

Incremental Margins

Year	Contract Projects	Construction Management
2004	5.29%	4.07%
2005	4.20%	2.92%
2006	3.90%	2.97%
2007	3.61%	4.08%
2008	4.76%	4.37%
2009	4.69%	4.78%
Minimum	3.61%	2.92%
Maximum	5.29%	4.78%
Median	4.44%	4.07%
Mean	4.43%	3.88%
Std Deviation	0.62%	0.78%
	Normal Distribution	

Revenue Growth Rate 2011 and 2012

Low	-5.00%	} Triangular Distribution
Most likely	2.00%	
High	4.00%	

Revenue Growth Rate 2014 - 2020\*

Minimum	-1.36%	} Normal Distribution
Maximum	14.62%	
Median	6.46%	
Mean	7.88%	
Std Deviation	3.12%	

\*Annual Change in US GDP, Nominal Basis, 1969-2010

**Simulation Statistics**

**XLSTAT**  
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No. of Trials 100,000  
Time 83.140625  
Seed 1

	Output 1	Output 2	Output 3	Output 4	Output 5	Output 6	Output 7	Output 8	Output 9	Output 10	Output 11	Output 12
Average	837,976	651,949	673,311	675,024	676,138	707,844	741,885	777,185	817,269	859,505	903,390	948,368
Std Dev	317,376	218,303	169,880	169,580	171,915	183,839	198,106	211,871	227,443	244,247	261,248	280,879
Std Err	1,004	690	537	536	544	581	626	670	719	772	826	884
Max	2,382,776	1,684,225	1,674,579	1,630,734	1,616,925	1,707,104	2,102,659	2,073,329	2,019,410	2,298,990	2,299,289	2,482,085
Min	-840,696	-225,270	-9,814	-123,289	-46,985	26,056	-138,510	-166,626	-183,534	-230,446	-192,059	-152,775
Percentiles												
5%	334,210	307,079	405,140	406,356	404,599	417,140	430,223	445,020	460,984	478,966	496,316	510,640
10%	440,758	379,395	461,657	463,598	462,178	478,751	495,616	514,540	535,509	558,866	580,315	601,690
15%	514,578	429,236	500,624	502,197	501,409	520,816	539,707	562,021	585,967	611,036	637,828	663,169
20%	571,265	468,388	530,588	533,080	532,088	554,105	575,454	600,692	626,189	654,414	684,580	713,244
25%	621,184	502,038	557,056	559,648	559,410	582,811	606,504	632,436	661,024	691,773	724,065	757,044
30%	666,431	534,108	581,530	583,798	583,873	608,482	633,752	661,895	693,148	725,926	760,336	795,622
35%	708,945	563,220	603,850	606,289	606,079	632,514	660,135	689,351	722,447	758,224	794,678	831,970
40%	749,517	590,889	625,758	627,585	627,820	656,297	685,269	715,927	751,786	788,844	827,396	867,460
45%	788,823	617,741	646,315	648,587	649,073	678,342	709,999	742,377	780,271	819,210	859,504	902,003
50%	826,970	644,889	667,393	669,331	670,314	700,456	734,520	768,207	808,767	848,648	891,731	936,063
55%	867,303	672,472	688,270	690,196	691,551	723,651	758,708	794,931	836,636	878,383	923,761	970,413
60%	906,903	700,301	710,333	711,828	713,190	746,980	784,129	821,641	865,112	909,816	957,767	1,006,125
65%	949,627	729,304	733,120	734,656	735,939	770,897	810,644	849,392	895,610	942,252	992,852	1,043,522
70%	994,033	760,371	757,275	758,559	760,452	797,449	838,791	879,417	927,535	976,755	1,029,759	1,083,079
75%	1,042,946	793,809	784,002	785,148	787,144	826,681	869,398	912,971	962,958	1,015,113	1,071,446	1,126,190
80%	1,100,387	830,871	813,533	815,239	817,120	858,935	904,514	950,423	1,003,570	1,058,648	1,116,943	1,176,345
85%	1,163,304	875,997	848,242	849,569	852,154	896,957	946,278	994,163	1,050,795	1,108,638	1,170,741	1,235,133
90%	1,246,755	932,818	892,524	893,614	897,858	946,242	998,668	1,051,386	1,111,506	1,174,837	1,241,121	1,310,333
95%	1,376,507	1,022,651	960,514	962,461	968,719	1,021,425	1,080,069	1,138,596	1,205,403	1,281,357	1,351,017	1,430,558
100%	2,382,776	1,684,225	1,674,579	1,630,734	1,616,925	1,707,104	2,102,659	2,073,329	2,019,410	2,298,990	2,299,289	2,482,085

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City of Meridian v. Petra Inc.  
Calculation of Economic Damages--Scenario 2

Schedule 13

Contract Management (CM) Losses	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Growth Rate of CM Revenues				-0.18%	0.11%	3.74%	11.80%	8.63%	6.90%	9.33%	3.78%	5.80%
Overall Market Activity	\$588,300,494	\$405,339,488	\$315,000,000	\$314,436,360	\$314,780,672	\$326,569,198	\$365,088,282	\$396,581,474	\$423,961,240	\$463,523,729	\$481,057,475	\$508,969,084
Lost Market Share	1.1%	1.1%	0.7%	1.6%	1.4%	1.4%	1.0%	0.7%	1.0%	1.9%	1.3%	0.6%
Lost CM Volume	\$6,233,093	\$4,306,622	\$2,112,048	\$5,010,660	\$4,453,226	\$4,656,058	\$3,734,528	\$2,919,874	\$4,357,084	\$8,946,088	\$6,380,209	\$3,087,106
Historical Average CM Fees	4.3%	4.7%	4.2%	3.3%	3.8%	4.4%	5.5%	3.3%	3.4%	5.1%	3.3%	4.3%
Lost CM Fees	\$267,855	\$202,267	\$88,671	\$165,237	\$168,751	\$204,881	\$206,802	\$96,221	\$149,383	\$453,630	\$209,759	\$132,801
Lost CM Reimbursed Salaries	\$0	\$0	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000	\$150,000
Total CM Losses	\$267,855	\$202,267	\$238,671	\$315,237	\$318,751	\$364,881	\$364,802	\$246,221	\$298,383	\$603,630	\$359,759	\$282,801

Contract Revenue Losses

Growth Rate of Contract Revenues				-0.18%	0.11%	3.74%	11.80%	8.63%	6.90%	9.33%	3.78%	5.80%
Overall Market Activity	\$588,300,494	\$405,339,488	\$315,000,000	\$314,436,360	\$314,780,672	\$326,569,198	\$365,088,282	\$396,581,474	\$423,961,240	\$463,523,729	\$481,057,475	\$508,969,084
Lost Market Share	0.8%	3.8%	1.4%	3.2%	1.3%	1.8%	0.8%	1.3%	4.9%	4.3%	2.6%	0.0%
Lost Contract Revenue	\$4,734,308	\$15,478,530	\$4,527,632	\$10,090,276	\$4,123,024	\$5,824,054	\$2,792,902	\$5,079,650	\$20,941,185	\$20,148,444	\$12,741,161	\$224,469
Incremental Profit Margin	4.2%	4.2%	3.9%	3.6%	4.0%	3.7%	4.7%	4.4%	5.0%	4.9%	4.1%	4.9%
Total Lost Contract Profits	\$389,686	\$655,129	\$175,389	\$364,543	\$163,989	\$215,545	\$131,388	\$228,796	\$1,067,487	\$881,362	\$524,346	\$18,983

Increase in Liability Insurance Expense	\$0	\$75,000	\$75,000	\$75,000	\$75,000	\$75,000	\$75,000	\$75,000	\$75,000	\$75,000	\$75,000	\$75,000
Simulated Nominal Losses	\$468,540	\$882,396	\$400,049	\$748,790	\$537,712	\$641,426	\$493,000	\$543,977	\$1,431,709	\$1,610,901	\$988,105	\$368,736

Important Note:

The rows above are presented only to help convey the structure of the projection model, not the results. Because this analysis relies on Monte Carlo simulation, the projected results shown above will change every time the spreadsheet is recalculated (i.e., every time any key is struck). The actual results stemming from this model are presented below on the line styled as "model output." Monte Carlo input variables are shown on Schedule 13, detailed output results by percentile are presented on Schedule 12.

Model Output	\$837,936	\$651,940	\$673,311	\$675,004	\$676,138	\$787,844	\$741,885	\$777,185	\$817,389	\$858,505	\$888,390	\$948,368
Risk-Adjusted Discount Rate	17.4%											
Present Value Date	10/10/10											
Cash Flow Date		12/31/10	06/30/11	06/30/12	06/30/13	06/30/14	06/30/15	06/30/16	06/30/17	06/30/18	06/30/19	06/30/20
No. of Discount Periods	0	0.22	0.72	1.72	2.72	3.72	4.72	5.72	6.72	7.72	8.72	9.72
Present Value of Nominal Losses	\$837,936	\$638,934	\$688,972	\$632,312	\$487,261	\$388,862	\$348,386	\$330,822	\$278,511	\$348,584	\$223,529	\$388,864
Cumulative Present Value of Losses	\$837,936	\$638,934	\$1,228,905	\$1,761,288	\$2,178,489	\$2,568,530	\$2,966,887	\$3,227,708	\$3,506,219	\$3,755,808	\$3,979,382	\$4,179,196

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## Professional Qualifications

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Keith A. Pinkerton, CFA, ASA

**Education**

Bachelor of Arts (Economics), University of South Florida (Tampa, Florida), 1991

Master of Business Administration (Finance), Baylor University (Waco, Texas), 1996

**Professional Certifications**

Chartered Financial Analyst—the CFA Institute, Charter Number 45208, awarded September 2001.

Accredited Senior Appraiser, Business Valuation discipline, the American Society of Appraisers, awarded 2003.

**Professional Employment History**

2005 – Present	Director of Valuation Services, Hooper Cornell, PLLC, Boise, Idaho
2009 - 2009	Adjunct Professor of Finance, George Fox University, Boise Center
2003 – 2005	Valuation Manager, Pershing Yockley & Associates, Knoxville, Tennessee
2000 – 2003	Valuation Manager, WP Valuation Services, Fort Worth, Texas
1995 – 2000	Manager, the Perryman Group, Waco, Texas
1991 – 1995	Economist, United States Department of Agriculture, Washington, DC

**Memberships and Affiliations**

- The CFA Institute ([www.cfainstitute.org](http://www.cfainstitute.org))
- The CFA Society of Idaho
- The American Society of Appraisers ([www.appraisers.org](http://www.appraisers.org))
- National Association for Business Economics ([www.nabe.com](http://www.nabe.com))
- National Association of Forensic Economics ([www.nafe.net](http://www.nafe.net))
- Treasure Valley Estate Planning Council
- Ludwig von Mises Institute for Austrian Economics ([www.mises.org](http://www.mises.org))
- Business Valuation Discussion Group ([www.bvdg.org](http://www.bvdg.org))

**Articles, Presentations and Professional Activities**

- **Co-Author**, *Marketability & Lack of Control Discounts*, Paper presented to the American Academy of Matrimonial Lawyers, March 2002
- **Panelist**, *Helping a Business Survive a Down Cycle*, Panel discussion for the Fort Worth Chapter of the Texas Society of CPAs, February 2003
- **Speaker**, *Business Valuation Update: Hot Issues*, Presented to the Institute of Management Accountants, East Tennessee State University, September 2003
- **Speaker**, *Business Valuation Update: Hot Issues*, Presentation to the Institute of Management Accountants, Knoxville Chapter, September 2003
- **Speaker**, *Litigation Support & Professional Practice Valuation*, Presentation to the Institute of Management Accountants, Knoxville Chapter, December 2003
- **Speaker**, *SFAS No. 141 & 142, Business Combinations and Intangible Assets*, Presentation to the Fort Worth Chapter of the Texas Society of CPAs, November, 2002
- **Grader**, 2002, 2003, and 2004 Chartered Financial Analyst Examinations, the CFA Institute, Charlottesville, VA.
- **Speaker**, *AICPA's Proposed Business Valuation Standards*, Presentation to Idaho Society of Certified Public Accountants, September, 2005.
- **Member**, *Domestic Review Team*, 2007 Chartered Financial Analyst Examination, CFA Institute, Charlottesville, VA.

Keith A. Pinkerton, CFA, ASA (continued)

- Speaker, Business Valuation and Credit Analysis: Similarities and Differences, Presentation to US Bank, Boise, Idaho, May, 2005.
- Speaker, AICPA's Proposed Business Valuation Standards, Presentation to Idaho Society of Certified Public Accountants, September, 2005.
- Speaker, Business Valuation Basics, Presentation to TechNet—Idaho Falls, September, 2005.
- Speaker, Business Valuation, Hot Issues for 2006 and Beyond, Presentation to Idaho Society of Certified Public Accountants, January, 2006.
- Guest-Lecturer, Differences in Valuation of Publicly-Traded and Privately-Held Companies, Presented to MBA students at Boise State University, April, 2006.
- Speaker, Business Valuation Basics and How to Use Valuation/Finance Theory to Increase the Value of Your Business, Boise Metro Chamber of Commerce, May, 2006.
- Speaker, Privately-Held Companies v. Publicly Traded Stock: Differences and Issues for Valuation, Presented to the CFA Society of Idaho, May 2006.
- Co-Author, For What Its Worth, a recurring column in the Idaho Business Review, 2006 - 2009.
- Co-Author, Company-Specific Risk—A Different Paradigm: A New Benchmark, Business Valuation Review, Spring 2006, Volume 25, No.1.
- Speaker, 2006 Tax Court Case Update, Treasure Valley Estate Planning Council, June 2006.
- Author, 2006 Valuation Court Case Update, September 27, 2006.
- Speaker, Top Estate Planning, Wealth Transfer and Asset Protection Techniques, Sept. 2006.
- Co-Author, The Guideline Publicly Traded Company Method and the Market Value of Invested Capital, Business Valuation Review, Summer 2006, Volume 25, No.2.
- Co-Author, Quantification of Company-Specific Risk: A New Empirical Framework with Practical Applications, Business Valuation Update, Volume 13, Number 2; February 2007.
- Author, Does The Pension Protection Act of 2006 Impact All Tax Valuations? An Assessment of the New Law's Reach, Adjusting Entries, the Journal of the ISCPA, Issue 1, 2007.
- Panelist, Quantifying Company Specific Risk, an audio telephone conference for business appraisers hosted by Business Valuation Resources, March 8, 2007.
- Guest-Lecturer, Understanding Valuation of Private Companies, Presentation to graduate Finance class at Boise State University, May, 2007.
- Co-Author, Buy-Sell Agreements: A Misnomer? Adjusting Entries, Journal of the ISCPA, Issue II, 2007.
- Speaker, Business Valuation Basics & How to Sell Your Company for Top Dollar, Pocetello Small Business Development Center, March 2007.
- Speaker, Quantifying Company Specific Risk, internal training seminar presented to a Top 100 public accounting firm, Minneapolis, MN, May 23, 2007.
- Co-Author, Quantifying Company-Specific Risk: The Authors Answer Your Questions, Business Valuation Update, Volume 13, Number 5; May 2007.
- Speaker, Quantifying Company Specific Risk, appraisal training session presented at the Institute of Business Appraisers 2007 Symposium; Denver, CO, June 2007.
- Co-Author, A Hybrid Restricted Stock/Pre-IPO Data Point: Lack of Marketability Discount for ESOPs; Business Valuation Review, Summer 2007, Volume 26, No.2.
- Speaker, The Case of the Disappearing Debt: Valuation or Lost Profits with Changing Assumptions; appraisal training Session presented at the Institute of Business Appraisers 2007 Symposium; Denver, CO, June 2007.
- Co-Author, Company Specific Risk: The Dow 30 vs. Private Company USA; The Value Examiner, September/October 2007.

Keith A. Pinkerton, CFA, ASA (continued)

- Co-Developer, *Company-Specific Risk Calculator*, a commercial program for computing company-specific risk for publicly-traded benchmarks; available on [www.bvmarketdata.com](http://www.bvmarketdata.com).
- Co-Author, *Stock Options: Corporate Lottery Ticket—or Not?*, *Adjusting Entries*, the Journal of the ISCPA, Issue 2, 2007.
- Co-Author, *Comparing the Butler-Pinkerton Model to Traditional Methods Under Four Daubert Criteria*; *Business Valuation Update*, Volume 13, Number 11; November 2007.
- Co-Author, *Quantifying Company-Specific Risk—Regardless of Your Faith in Beta*; *Business Appraisal Practice*, Winter 2007
- Co-Author, *Company-Specific Risk: Believe It or Not - You Can Quantify It!* *Adjusting Entries*, the Journal of the ISCPA, Issue 1, 2008.
- Panelist, *Using the BPM™ Total Cost of Equity and Public Company Specific Risk Calculator™*; an audio telephone conference hosted by NACVA and Business Valuation Resources, March 8, 2007.
- Co-Author, *Butler Pinkerton Model™ Finds Another Application in SFAS 123R*; *Business Valuation Update*, Volume 14, No.3, March, 2008.
- Co-Author, *Total Cost of Equity of Company-Specific Risk—A Better Use for the BPM?*; *Business Valuation Update*, Volume 14, No.4, April 2008.
- Co-Author, *Why You Should Be Aware of the Impact of SSVS-1*; *Adjusting Entries*, the Journal of the ISCPA, Issue 11, 2008.
- Speaker, *Pension Plans and Closely-Held Companies, Valuing Tricky Assets in Divorce*; presented to the Idaho State Bar Association; Boise, Idaho; May 9, 2008.
- Speaker, *The Butler Pinkerton Model: Empirical Support for Company Specific Risk*; presented to the National Association of Certified Valuation Analysts, Las Vegas, NV; June 10, 2008.
- Speaker, *The Butler Pinkerton Model: Empirical Support for Company Specific Risk*; presented to the California Society of Certified Public Accountants—BVFLS Section, Las Angeles, CA; Aug 21, 2008.
- Speaker, *Using the Butler Pinkerton Model in Valuation Reports*; an Internet webinar hosted by the National Association of Certified Valuation Analysts; December 5, 2008.
- Co-Author, *There's a New Beta in Town, and Its Name is Total Beta*; *Business Valuation Update*, Volume 15, No.3, March 2009.
- Co-Author, *Butler Pinkerton Model Report*, an E-book published by Morningstar, March, 2009.
- Co-Author, *A Total Repudiation of Mr. Kasper's Critique of the Butler Pinkerton Model*, an online article disseminated through [www.bvmarketdata.com](http://www.bvmarketdata.com), May 2009.
- Author, *Response to Larry Kasper Regarding the Diversification Argument*; *The Value Examiner*, January/February 2010
- Co-Author, *Total Beta: the Missing Piece of the Cost of Capital Puzzle*; *Valuation Strategies*, May/June, 2009.
- Speaker, *Cost of Capital*, California Society of CPAs, May 2009
- Speaker, *Cost of Capital*, presented to the National Association of Certified Valuation Analysts, Boston, MA; May 27, 2009.
- Speaker, *Getting the Most from Your Financial Expert in Personal Injury Litigation Matters*, a CLE presentation to various Boise-area law firms, various dates, 2009.
- Author, *The Search for Value*, published in the quarterly newsletter of George Fox University, Fall, 2009.
- Speaker, *Buy-Sell Disagreements and Solutions*, presented to the Boise Estate Planning Council, November 2, 2009.
- Speaker, *Business Valuation: Demystifying the Process*, presented to attorneys and clients of Perkins Coie, LLP, March 30, 2010.
- Co-Author, *Financing Your Practice*, *Chiropractic Economics*, Volume 56, Issue 5; March 29, 2010.

Keith A. Pinkerton, CFA, ASA (continued)

- Author, *The Wonder Years: Integrating Your Practice into a Comprehensive Retirement Plan*, *Chiropractic Economics*, Volume 56, Issue 6; April 20, 2010.
- Author; *An Update on Proposed IRS' Appraiser Penalty Procedures; Adjusting Entries*, the *Journal of the ISCPA*, Issue 11, 2010.
- Co-Author, *Give it to me Straight: Answers to Old Questions about Buy or Lease*; *Chiropractic Economics*, Volume 56, Issue 7; May 12, 2010.
- Author, *Sale-abrate Your Practice*; *Chiropractic Economics*, Volume 56, Issue 10; June 25, 2010.
- Author, *Financial Accounting and Managerial Accounting Compared*, a paper to accompany the seminar *Accounting 101 for Attorneys*, presented August 12, 2010.
- Author, *Financial Statement Basic Concepts*, a paper to accompany the seminar *Accounting 101 for Attorneys*, presented August 12, 2010.
- Instructor, *Accounting 101 for Attorneys*, a CLE presentation given to area attorneys on August 12, 2010
- Speaker, *Buy Sell Agreements: Road Map to Success or Recipe for Disaster*, presented at the Idaho State Bar's Annual Advanced Estate Planning Seminar, September 2010.

Expert Testimony

- Cause No. 99-20905-Y in the 303rd District Court of Dallas County; Dallas, Texas, Trial Testimony, Business Appraisal for Marital Dissolution; retained by Plaintiff(s).
- Cause No. 296-50175-01 in the 296th District Court of Collin County; McKinney, Texas, Trial Testimony, Business Appraisal for Marital Dissolution; retained by Plaintiff(s).
- Cause No. 158874-2 in the Chancery Court for Knox County, Knoxville, Tennessee, Trial Testimony, Quantification of Economic Damages—Dissenting Shareholder matter; retained by Plaintiff(s).
- Cause No. 153673-3 in the Chancery Court for Knox County, Knoxville, Tennessee, Deposition Testimony, Quantification of damages associated with the purchase of an operating business; retained by Plaintiff(s).
- Civil Action No. 05-CI-00233, Bell Circuit Court, Commonwealth of Kentucky, Deposition Testimony, Business appraisal and quantification of economic damages for dissenting shareholder matter; retained by Defendant(s).
- Civil Action No. 05-CI-00233, Bell Circuit Court, Commonwealth of Kentucky, Trial Testimony, Business appraisal and quantification of economic damages for dissenting shareholder matter; retained by Defendant(s).
- Civil Case No. CV-03-12224, Canyon County District Court, State of Idaho, Deposition Testimony, Quantification of damages associated with bad faith claim; retained by Defendant(s).
- Civil Case No. 1:05-CV-141-S-EJL, United States District Court, District of Idaho, Deposition Testimony, Quantification of damages associated with alleged trade-loading and breach of duty; retained by Defendant(s).
- Civil Case No. CV-2005-493-C, Valley County District Court, State of Idaho, Deposition Testimony, Quantification of damages associated with breach of contract; retained by Defendant(s).
- Civil Case No. CV DR 0722658, Ada County District Court, State of Idaho, Trial Testimony, Business appraisal for marital dissolution; retained by Defendant(s).
- Civil Case No. CV DC 0608433, Ada County District Court, State of Idaho, Deposition Testimony, quantification of damages associated with defamation claim; retained by Plaintiff(s).
- Civil Case No. CV-2008-1069-OC, Bannock County District Court, State of Idaho, Deposition Testimony, quantification of damages associated with defamation and interference with prospective advantage.
- Civil Case No. CV-PJ-0718437, Ada County District Court, State of Idaho, Trial Testimony, quantification of economic damages associated with wrongful death and personal injury; retained by Defendant(s).
- Civil Case No. CV-2006-3325-PJ, Bannock County District Court, State of Idaho, Trial Testimony, quantification of economic damages associated with personal injury; retained by Defendant(s).

- Civil Case No. CV-PI-0704871, Ada County District Court, State of Idaho, Trial Testimony, quantification of economic damages associated with personal injury; retained by Defendant(s).
- Appeal Nos. 09-A-1335 and 09-A-1336, Idaho Board of Tax Appeals; Rebuttal Testimony, proper application of appraisal theory; retained by Defendant(s).
- Civil Case No. CV-07-553, Jefferson County District Court, State of Idaho, Trial Testimony, quantification of damages associated with bad faith claim; retained by Defendant(s).
- Civil Case No. CV DB 2009-06035, Ada County District Court, State of Idaho, Trial Testimony, Business appraisal for marital dissolution; retained by Plaintiff(s).
- Civil Case No. CV OC 0902282, Ada County District Court, State of Idaho, Deposition Testimony, analysis of lost profits associated with breach of contract and misappropriation of trade secrets; retained by Defendant(s).
- Civil Case No. CV OC 0902282, Ada County District Court, State of Idaho, Trial Testimony, analysis of lost profits associated with breach of contract and misappropriation of trade secrets; retained by Defendant(s).

Professional Billing Rate

\$285 per hour

ORIGINAL

NOV 4 2010  
A.M. P.M. 4

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

Thomas G. Walker (ISB 1856)  
Erika Klein (ISB 5509)  
Mackenzie Whatcott (ISB 6774)  
Matthew Schelstrate (ISB 8276)  
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E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com)  
[mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com).

Attorneys for Defendant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE VACATING DEPOSITION

Defendant Petra Incorporated ("Petra"), by and through its attorney of record, Thomas G. Walker, of the law firm Cosho Humphrey, LLP, hereby provides notice that it is vacating the the deposition of Laura Knothe scheduled for November 5, 2010.

DATED: November 4, 2010

COSHO HUMPHREY, LLP

By: 

THOMAS G. WALKER


Attorneys for Defendants, Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 4<sup>th</sup> day of November, 2010, a true and correct copy of the within and foregoing document was served upon the following in the manner indicated:

Kim J. Trout, Esq.  
Daniel Loras Glynn  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- |                                     |                   |
|-------------------------------------|-------------------|
| <input type="checkbox"/>            | U.S. Mail         |
| <input type="checkbox"/>            | Hand Delivery     |
| <input type="checkbox"/>            | Overnight Courier |
| <input checked="" type="checkbox"/> | Facsimile:        |
| <input type="checkbox"/>            | E-mail:           |

  
THOMAS G. WALKER



ORIGINAL

**KIM J. TROUT, ISB #2468**  
**DANIEL LORAS GLYNN, ISB#5113**  
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.  
225 North 9th Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701  
Telephone: (208) 331-1170  
Facsimile: (208) 331-1529

Attorneys for Plaintiff

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 1-20

NOV 05 2010

J. DAVID NAVARRO, Clerk  
By \_\_\_\_\_ DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**PLAINTIFF'S MOTION FOR  
SANCTIONS**

The City of Meridian, ("City"), by and through its attorney of record, Kim J. Trout of the firm TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A., moves this Court pursuant to Rules 1 and 26 of the Idaho Rules of Civil Procedure for sanctions against Petra, Incorporated finding and concluding the following:

1. Petra, Incorporated ("Petra") violated Idaho Rule of Civil Procedure 26(b)(4)(A)(iii) by contacting expert witnesses of an opposing party without first obtaining permission of the opposing party or the Court.

2. Petra by direct and/or indirect force and threats willfully intimidated, and attempted to influence, impede, deter, threaten, and obstruct the City's expert witness from testifying freely, fully and truthfully in the civil proceeding, in violation of Idaho Code §18-2604(1).

Due to these facts, the City requests this Court impose sanctions as follows:


1. That the defenses asserted by Petra in this matter be hereby stricken;
2. That the Court vacate the trial in order to allow the City to replace its expert witnesses;
3. That in addition the Court allow monetary costs for experts which had been previously employed by the City to testify in this matter;
4. For attorneys fees and cost for preparing new experts for trial;
5. For attorneys fees and costs for bringing this Motion; and
6. Imposing civil penalties against Petra.

This Motion is based on the pleadings, records and files in this case. The City's Memorandum in Support of its Motion For Sanctions filed and served contemporaneously herewith, together with the Affidavit of Kim J. Trout, Leo Geis, and Tim Petsche filed contemporaneously herewith.

Oral Argument is requested on this Motion.

DATED this 5th day of November, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.

By:   
KIM J. TROUT  
Attorneys for Plaintiff


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5th day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
P.O. Box 9518  
Boise, ID 83707-9518  
Fax: (208) 639-5609

Hand Delivered  
U.S. Mail  
Fax  
Fed. Express  
Email

<input checked="checked" type="checkbox"/>
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<input type="checkbox"/>

  
\_\_\_\_\_  
Kim J. Trout

ORIGINAL

**KIM J. TROUT, ISB #2468**  
**DANIEL LORAS GLYNN, ISB#5113**  
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.  
225 North 9th Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701  
Telephone: (208) 331-1170  
Facsimile: (208) 331-1529

Attorneys for Plaintiff

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 12:00

NOV 05 2010

J. DAVID NAVARRO, Clerk  
By \_\_\_\_\_ DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S MOTION FOR  
SANCTIONS**

COMES NOW, THE Plaintiff/Counter-defendant, The City of Meridian, ("City"), by and through its attorney of record, Kim J. Trout of the firm TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A., and hereby submits the following Memorandum in support of the City's Motion for Sanctions. This Memorandum is supported by the Affidavit of Kim J. Trout filed concurrently herewith, the undisputed facts, as well as the papers and pleadings filed in this matter. In this action the City seeks relief from the Court, in the form of sanctions.

## **I. INTRODUCTION**

This matter concerns a construction project that spanned two and a half years. During that construction there were approximately forty prime-contracts for various components of the construction, and currently there are six major systems of construction requiring expert opinion analysis. Moreover, due to the magnitude and complexity of the construction, a substantial amount of documentation and numerous depositions had to be necessarily reviewed by the experts employed by the City in order to properly prepare this matter for trial, and to defend itself against Defendant's Counterclaims. For example, during the voluminous discovery process, the City alone produced more than 116,000 pages, which consists of more than 33,000 documents. Likewise, Petra produced approximately 15,000 documents consisting of approximately 55,000 pages of documents. After all this effort and expense on the City's behalf, and with trial less than one (1) month away, it has come to the City's attention that Petra has contacted several of the City's expert witnesses, and willfully through direct and/or indirect threats attempted to intimidate, influence, impede, deter, threaten, and obstruct the City's expert witnesses from testifying freely, fully and truthfully in the civil proceeding presently before this honorable Court.

## **II. ARGUMENT**

With regard to witness intimidation, Idaho Code §18-2604(1) states "any person who, by direct or indirect force or by any threats to a person or property or by any manner willfully intimidates, influences, impedes, deters, threatens, harasses, obstructs or prevents a witness ... or any person who may be called as a witness or any person he believes may be called as a witness in a civil proceeding from testifying freely, fully and truthfully in the civil proceeding is guilty of a misdemeanor." The penalty for violating Idaho Code §18-2604(1) is a maximum of six months in jail, a \$300 fine, or both. *See* Idaho Code §18-113. Moreover, Idaho Rule of Civil Procedure 26(b)(4)(A)(iii) states "no party shall contact an expert witness of an opposing party without first obtaining permission of an opposing party

or the court.” Further, Idaho Rule of Civil Procedure Rule 1 mandates that the rules of civil procedure “be liberally construed to secure *the just*, speedy and inexpensive determination of every action and proceeding.” (Emphasis added.)

In *State of Idaho v. Rogers*, 143 Idaho 320, 144 P.3d 25 (2006) the Supreme Court held that a party who violates a court order or rule is susceptible to sanctions. *See* 143 Idaho at 322, 144 P.3d at 27. For the purpose of imposing sanctions, a party acts in bad faith when it willfully conducts itself improperly or acts with an improper purpose. *Id.* (citing *Fink v. Gomez*, 239 F.3d 989, 992 (Ninth Cir. 2001)). Moreover, the Idaho Supreme Court has recognized “that trial courts have an ‘inherent authority to assess sanctions for bad faith conduct against all parties appearing before it.’” *Id.* (citing *In re SRBA*, Case No. 39576, 128 Idaho 246, 256, 912 P.2d 614, 624 (1995) (citing *Chambers v. Nasco, Inc.*, 501 U.S. 32, 50, 111 S.Ct. 2123, 2136, 115 L.Ed. 2d 27, 48 (1991))).

Clearly, Petra willfully conducted itself improperly and acted with an improper purpose when it contacted several of the City’s expert witnesses, and through its direct and/or indirect threats intimidated, influenced, impeded, deterred, threatened, and obstructed the City’s expert witness from testifying freely, fully and truthfully in the civil proceeding presently before this honorable Court. As discussed above, the City has had to expend considerable time, effort and resources in order prepare and present expert testimony, not only to defend itself against Defendant’s Counterclaims, but to present its case to this Court in order to get relief from Petra wrongdoing. Due to these facts, sanctions against Petra are not only justified, they are warranted. The City respectfully requests that this Court impose all of the following sanctions against Petra for it egregious conduct at this late date:

1. That the defenses asserted by Petra in this matter be hereby stricken;
2. That the Court vacate the trial in order to allow the City to replace its expert witnesses;
3. That in addition the Court allow monetary costs for experts which had been previously employed by the City to testify in this matter;

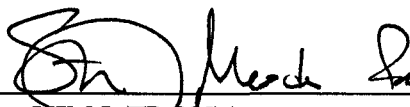
4. For attorneys fees and cost for preparing new experts for trial;
5. For attorneys fees and costs for bringing this Motion; and
6. Imposing civil penalties against Petra.

### CONCLUSION

For the reasons stated, the City respectfully requests that this Court grant its Motion for Sanctions.

RESPECTFULLY submitted this 5th day of November, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.

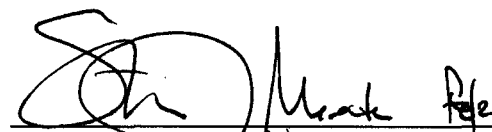
By:   
KIM J. TROUT  
Attorneys for Plaintiff

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
P.O. Box 9518  
Boise, ID 83707-9518  
Fax: (208) 639-5609

Hand Delivered ☒  
U.S. Mail ☐  
Fax ☐  
Fed. Express ☐  
Email ☐

  
Kim J. Trout

ORIGINAL

**KIM J. TROUT, ISB #2468**  
**DANIEL LORAS GLYNN, ISB#5113**  
**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.**  
225 North 9th Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701  
Telephone: (208) 331-1170  
Facsimile: (208) 331-1529

Attorneys for Plaintiff

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. *1:00*

NOV 05 2010

J. DAVID NAVARRO, Clerk  
By \_\_\_\_\_ DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**AFFIDAVIT OF LEO GEIS IN SUPPORT  
OF PLAINTIFF'S MOTION FOR  
SANCTIONS**

STATE OF IDAHO    )  
                              ) :ss  
County of ADA     )

LEO GEIS, being duly sworn upon oath, deposes and says:

1. I am at least eighteen (18) years of age and am competent to testify regarding the matters set forth herein.

2. I am employed by Idaho Airships, Inc. and Votum Thermography. I have been hired by law firm of TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A., as an expert witness testifying on behalf of the Plaintiff in this matter, and I make the following statements based upon my own personal knowledge.



3. On or about October 21, 2010, Jerry Frank, of Petra, Incorporated contacted me via telephone. During the conversation, his demeanor was icy. It was my perception that Mr. Frank held the belief that since I was testifying on behalf of the City, that I was coming after him.

4. While he expressed no direct threat against me he did quote me a verse from Proverbs 25:9 which states, "Debate thy cause with thy neighbor himself, and discover not the secret to another."

5. Mr. Frank's point was that since we were both Christians, we should go to church leadership with our difficulties and avoid the public eye. I felt that this was a very skewed interpretation of this passage.

6. It would be unreasonable for me to say that Mr. Frank was not trying to influence me, however, I am uncertain what he wanted me to do. A reasonable man would conclude that he wanted me to do something.

7. I felt that this contact was grossly inappropriate. I tried to explain to Mr. Frank that I give testimony on both sides of issues, and that I am unbiased. As proof of this I pointed out that the pictures I had taken are purely objective. However, I could tell that these arguments got no traction with him.

8. It was my impression from Mr. Frank's interpretation of this Proverb that what he was trying to say to me was as a Christian I should not testify in a manner that would be pejorative against another Christian.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

  
LEO GEIS

Subscribed and sworn to before me this 5<sup>th</sup> day of November, 2010.



*K Serrano*

Notary Public, State of Idaho

Residing at: Boise, ID

My commission expires: 01-20-2016

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5 day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P.O. Box 9518  
Boise, Idaho 83707-9518  
Direct Facsimile: (208) 639-5609

Hand Delivered

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Email

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*Kim J. Trout*

Kim J. Trout

ORIGINAL

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. *LD*

NOV 05 2010

J. DAVID NAVARRO, Clerk  
By \_\_\_\_\_ DEPUTY

KIM J. TROUT, ISB #2468  
STEVEN J. MEADE, ISB #6204  
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.  
225 North 9th Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701  
Telephone: (208) 331-1170  
Facsimile: (208) 331-1529

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**AFFIDAVIT OF TIM PETSCHKE IN  
SUPPORT OF PLAINTIFF'S MOTION  
FOR SANCTIONS**

STATE OF IDAHO    )  
                          ):ss  
County of ADA     )

TIM PETSCHKE, being duly sworn upon oath, deposes and says:

1. I am at least eighteen (18) years of age and am competent to testify regarding the matters set forth herein.

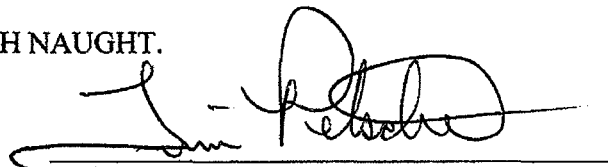
2. I am employed by TEP, Inc. I have been hired by law firm of TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A., as an expert witness testifying on behalf of the Plaintiff in this matter, and I make the following statements based upon my own personal knowledge.

3. On or about November 2, 2010, Brad Bird, contacted me via telephone. The conversation concerned the work that he had performed on the Meridian City Hall which is the focus of this case. During the conversation, he indicated to me that he had become aware that I had been hired as an expert witness testifying on behalf of the Plaintiff in this matter. While he didn't seem to know specifically how I was going to testify, he made it very clear that it was his opinion that the City of Meridian got exactly what they paid for.

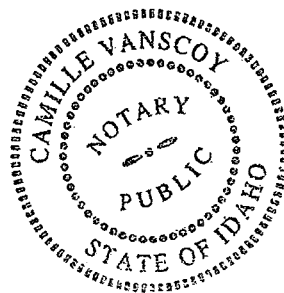
4. It was my impression that part of Mr. Bird's motive in contacting me was to discover additional information regarding my investigation and findings.

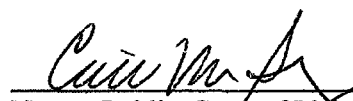
5. While he expressed no direct threat against me, I did feel intimidated. Furthermore, I felt that this contact was grossly inappropriate.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

  
TIM PETSCHÉ

Subscribed and sworn to before me this 5th day of November, 2010.



  
Notary Public, State of Idaho  
Residing at: MERIDIAN, IDAHO  
My commission expires: 9-13-2012

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

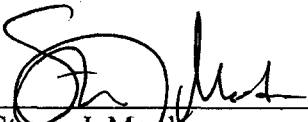
AFFIDAVIT OF TIM PETSCHÉ IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS - 2

006789

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P.O. Box 9518  
Boise, Idaho 83707-9518  
Direct Facsimile: (208) 639-5609

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Email

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Steven J. Mezde

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_ 1:00

NOV 05 2010

J. DAVID NAVARRO, Clerk  
By \_\_\_\_\_ DEPUTY

**KIM J. TROUT, ISB # 2468**  
**STEVEN J. MEADE, ISB # 6204**  
**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.**  
 225 North 9th Street, Suite 820  
 P.O. Box 1097  
 Boise, ID 83701  
 Telephone: (208) 331-1170  
 Facsimile: (208) 331-1529

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

V.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**AFFIDAVIT OF KIM J. TROUT IN  
SUPPORT OF PLAINTIFF'S  
MOTION FOR SANCTIONS**

STATE OF IDAHO) :ss  
County of ADA)

KIM J. TROUT, being duly sworn upon oath, deposes and says:

1. I am at least eighteen (18) years of age and am competent to testify regarding the matters set forth herein.
2. I am a member of the law firm of TROUT♦ JONES♦ GLEDHILL♦ FUHRMAN♦ GOURLEY, P.A., and represent the Plaintiff in this matter, and I make the following statements based upon my own personal knowledge.

3. Jason Neidigh is the general manager of DeBest Plumbing, Incorporated. Mr. Neidigh has been retained by this firm as an expert witness in the above-entitled matter.

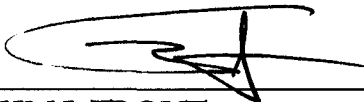
4. Milford Terrell is the founder and president of DeBest Plumbing, Incorporated.

5. In several conversations that I have had with Jason Neidigh it has been disclosed to me that Jerry Frank of Petra, Inc. contacted Milford Terrell and indicated to him that if DeBest Plumbing were to proceed to provide testimony against Petra, Inc. in this matter, that it would negatively impact any future business relationship between DeBest Plumbing and Petra, Inc.

6. Due to this fact Mr. Neidigh has been placed in a very negative situation by Petra, Inc.

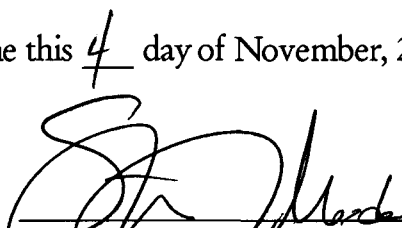
7. Based upon the information I have received, Petra willfully conducted itself improperly and acted with an improper purpose when it contacted this expert witness' employer, and through its direct and/or indirect threats has attempted to intimidate, influence, threaten, and obstruct the City's expert witness from testifying freely, fully and truthfully in the matter presently before this Court.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

  
KIM J. TROUT

Subscribed and sworn to before me this 4 day of November, 2010.



  
Notary Public, State of Idaho

Residing at: Boise, Idaho  
My commission expires: 12/28/2013

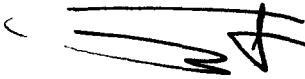
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5 day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSH O HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P.O. Box 9518  
Boise, Idaho 83707-9518  
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<input type="checkbox"/>

  
\_\_\_\_\_  
Kim J. Trout



ORIGINAL

KIM J. TROUT, ISB #2468  
DANIEL LORAS GLYNN, ISB#5113  
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.  
225 North 9th Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701  
Telephone: (208) 331-1170  
Facsimile: (208) 331-1529

Attorneys for Plaintiff

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 1:00

NOV 05 2010

By J. DAVID NAVARRO, Clerk  
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

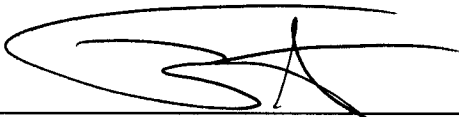
**MOTION TO SHORTEN TIME FOR  
HEARING**

COMES NOW Plaintiff, the City of Meridian ("City"), by and through its attorney of record, Kim J. Trout of the law firm of TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A., and hereby moves this Court, pursuant to Rule 6(b) of the Idaho Rules of Civil Procedure, for an order shortening the time for notice of hearing on Plaintiff's Motion for Sanctions.

DATED this 5th day of November, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.

By: \_\_\_\_\_

  
KIM J. TROUT  
Attorneys for Plaintiff

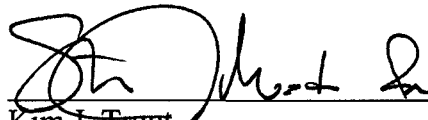
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 5th day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSH O HUMPHREY, LLP  
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P.O. Box 9518  
Boise, Idaho 83707-9518  
Direct Facsimile: (208) 639-5609

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\_\_\_\_\_  
Kim J. Trout

NOV 08 2010

J. DAVID NAVARRO, Clerk  
By INGA JOHNSON  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN,  
an Idaho Municipal Corporation,

Plaintiff,

vs.

PETRA INCORPORATED,  
an Idaho Corporation,

Defendant.

Case No. CVOC 09 07257

ORDER DENYING  
PLAINTIFF'S MOTION  
FOR PERMISSIVE APPEAL

This matter came before the Court on Plaintiff Meridian's Motion for Permissive Appeal pursuant to Idaho Appellate Rule 12. The Court heard oral argument on this motion on Friday, November 5, 2010. Kim Trout appeared for Plaintiff Meridian. Thomas Walker appeared for Defendant Petra. The Court took the motion under advisement.

Generally, an appeal under Idaho Appellate Rule 12 will be permitted only when the order involves a controlling question of law as to which there is substantial grounds for difference of opinion and when an immediate appeal may materially advance the orderly resolution of the litigation. *Kindred v. Amalgamated Sugar Co.*, 118 Idaho 147, 149, 982 P.2d 309, 311 (1990). In "accepting or rejecting an appeal by certification under I.A.R. 12, the Court should consider such factors" as: 1) whether there are substantial legal issues of great public interest or legal questions of

1 first impression involved; 2) the impact of an immediate appeal upon the parties; 3) the effect of the  
2 delay of the proceedings in the district court pending the appeal; 4) the likelihood or possibility of a  
3 second appeal after judgment is finally entered by the district court; and 5) the case workload of the  
4 appellate courts. *Budell v. Todd*, 105 Idaho 2, 4, 665 P.2d 701, 703 (1983). No single factor controls  
5 the Court's decision, but Rule 12 was intended to create an appeal in the exceptional case and it was  
6 not intended to broaden the appeals which may be taken as a matter of right under Rule 11. *Id.*

7       Upon consideration of the rule and the factors instructed by the caselaw, the Court DENIES  
8 plaintiff's motion for permissive appeal pursuant to I.A.R. 12.  
9

10       IT IS SO ORDERED.

11       Dated this 8<sup>th</sup> day of November, 2010.  
12

13  
14   
15 Ronald J. Wilper  
16 DISTRICT JUDGE  
17  
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26

CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 8 day of November, 2010, I caused a true and correct copy of the foregoing ORDER DENYING PLAINTIFF'S MOTION FOR PERMISSIVE APPEAL to be served by the method indicated below, and addressed to the following:

Kim J. Trout

TROUT JONES GLEDHILL FUHRMAN GOURLEY, PA  
225 N. 9th St., Ste 820  
PO Box 1097  
Boise, ID 83701

Fax: (208) 331-1529

( ) U.S. Mail, Postage Prepaid  
( ) Hand Delivered  
( ) Overnight Mail  
(x) Facsimile

Thomas G. Walker

COSHO HUMPHREY, LLP  
800 Park Blvd, Ste 790  
PO Box 9518  
Boise, ID 83707

Fax: (208) 338-3290

( ) U.S. Mail, Postage Prepaid  
( ) Hand Delivered  
( ) Overnight Mail  
(x) Facsimile

J. DAVID NAVARRO  
Clerk of the District Court  
Ada County, Idaho

By INGA JOHNSON  
Deputy Clerk

NO. \_\_\_\_\_ FILED 3:48  
A.M. \_\_\_\_\_ P.M.

NOV 08 2010

J. DAVID NAVARRO, Clerk  
By CARLY LATIMORE  
DEPUTY

KIM J. TROUT, ISB #2468  
DANIEL LORAS GLYNN, ISB #5113  
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.  
225 North 9th Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701  
Telephone: (208) 331-1170  
Facsimile: (208) 331-1529

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**NOTICE OF HEARING**


**TO: THE ABOVE NAMED DEFENDANT AND ITS COUNSEL OF RECORD:**

PLEASE TAKE NOTICE, that the hearing on Plaintiff's Motion to Dismiss Defendant's Claim for Lost Profits and/or Business Devastation Pursuant to the Idaho Tort Claims Act and Plaintiff's Motion for Sanctions will be heard on **Monday November 22, 2010 at the hour of 1:30p.m. before the Honorable Ronald J. Wilper.** The hearing is scheduled at the Ada County Courthouse located at 200 W. Front St., Boise, ID, 83702.

DATED this 8<sup>th</sup> day of November, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦  
GOURLEY, P.A.

By: \_\_\_\_\_



Kim J. Trout  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 8<sup>th</sup> day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
P.O. Box 9518  
Boise, ID 83707-9518  
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\_\_\_\_\_  
Kim J. Trout



ORIGINAL

NOV 9 2010  
J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB No. 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
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Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, AN IDAHO  
MUNICIPAL CORPORATION,

Plaintiff,

v.

PETRA, INCORPORATED, AN IDAHO  
CORPORATION. ,

Defendant.

Case No. CV-OC 2009-07257

MEMORANDUM IN SUPPORT OF  
PETRA'S RENEWED MOTION IN  
LIMINE TO EXCLUDE EVIDENCE OF  
THE CITY'S CLAIMED DAMAGES

The above-named Defendant/Counterclaimant, Petra, Incorporated ("Petra"), by and through its attorney of record, Thomas G. Walker, of the law firm Cosho Humphrey, LLP submits this memorandum in support of its Renewed Motion in Limine to Exclude Testimony and Documents regarding the Plaintiff City of Meridian's ("City") claimed damages.



## **1. Introduction**

During Petra's depositions of the City's primary experts, there have been at multiple instances of improper coaching or unwarranted objections by counsel for the City, particularly Mr. Trout. The City's obstructionist tactics at deposition have hindered Petra's ability to depose the City's experts and discover the basis for the damage claims. The tactics, coupled with the late, incomplete, and deficient disclosures by the City on its damages, have prejudiced Petra's ability to defend the case. Therefore, Petra requests an order excluding the City from offering evidence of its damages at trial, pursuant to I.R.C.P. 30(d)(1) and 37(b)(2)(B).

## **2. Background**

The City's continued obstructionist tactics in this case merit sanctions. The City filed this lawsuit after brushing aside Petra's attempts to mediate the claims pursuant the parties' contract. The next attempt at mediation was short-circuited by the City's claim it needed a full-blown discovery effort, exactly the result that the mediation provision was intended to avoid. The City has twice successfully vacated the trial and is now seeking a third order vacating the trial. Nearly 17 months after filing this lawsuit, the City finally made a feeble effort to disclose a basis for its claimed damages. This followed Petra's motion for a Court order excluding evidence of City's damages at trial. After reviewing the hodgepodge of documents the City claimed supported its damage claims, Petra sought to depose the City's experts and 30(b)(6) designees to determine whether there was any real basis for the City's claims. Petra's depositions were met with obstructionist tactics, continuing a pattern that developed at the beginning of this case and has now reached the point of causing prejudice.

Petra is entitled to know the basis for the City's claimed damages. Now, just 22 days before trial, the City continues its gamesmanship. As the Court knows, Petra has repeatedly attempted to ascertain the basis for the City's claim that it suffered damages because of what Petra did or failed to do. On September 27, 2010, the Court heard Petra's *Motion in Limine to Exclude Evidence of the City's Claimed Damages*. Although the Court did not grant Petra's Motion, the Court ordered the parties to meet and confer about the adequacy of the City's disclosures on damages not later than 30 days before trial.<sup>1</sup> At the October 18, 2010 mediation, the City provided a seemingly unrelated assortment of documents purporting to be supplementation of the City's responses to Petra's discovery requests regarding damages. Petra then took the deposition of Theodore W. Baird, Jr., the person the City designated as the most knowledgeable person regarding the City's claims.<sup>2</sup> Petra followed with the deposition of the City's expert Steven J. Amento, the person the City designated as the most knowledgeable person on the subject of the City's claimed damages.<sup>3</sup> After these depositions, and considering the inadequate disclosures of October 18, 2010, Petra must again ask the Court to exclude evidence of the City's claimed damages at trial.

### **3. Law and Argument**

The collection of documents the City offers as a response to Petra's discovery requests is inadequate, particularly with regard to the claimed damage amounts. As discussed in Petra's motion regarding the City's experts, filed contemporaneously, the City has provided various

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<sup>1</sup> See Affidavit of Thomas G. Walker filed Nov. 9, 2010 (Walker Nov. 9 Affidavit), at Exh. 3, pp. 53-54.

<sup>2</sup> See Walker Nov. 9 Affidavit at Exh. 5, 7.

<sup>3</sup> See Walker Nov. 9 Affidavit at Exh. 6, 8.

damage amounts.<sup>4</sup> None of these amounts have any foundation. All of them are the product of guesswork and speculation. Under the discovery rules, Petra is entitled to know the facts that the City claims support these amounts in order to have the opportunity to meet and rebut the facts at trial.

Further, Petra has conducted a Rule 30(b)(6) deposition of the person designated by the City as the “most knowledgeable regarding the damages” allegedly suffered by the City. Likewise, Petra has conducted the 30(b)(6) deposition of the person designated as most knowledgeable of the allegations set forth in paragraphs 4 through 21 of the City’s Complaint. Mr. Trout’s conduct during these depositions can only be described as obstructionist. And the City’s 30(b)(6) deponents failed to support the City’s damage claims and often failed to explain any of this City’s recent damage disclosures.

**3.1 The City has provided no basis for its damage claims, which are speculative, conclusory, and lack reliability and should be excluded under I.R.E. 702 and 703, and the Court’s orders**

Not only has the City failed to provide any testimony addressing how Petra’s performance caused any of its claimed damages, all the damage amounts lack foundation. Each is the product of speculation and none were arrived at through any reliable process. It is legally insufficient to simply provide an amount, even if it is provided by a construction professional. Without a foundation as to how the expert arrived at the figure, the damage amount should be excluded at trial. *See J-U-B Engineers, Inc. v. Security Ins. Co. of Hartford*, 146 Idaho 311, 315, 193 P.3d 858, 862 (2008).

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<sup>4</sup> See Walker Nov. 9 Affidavit at at Exh. 1.

A review of the damage disclosures by the City demonstrates that all the damage amounts lack support or explanation.<sup>5</sup> Consequently, Petra cannot determine how the City calculated any of them. There is no itemization or even a general explanation. An expert cannot simply throw out an amount and sit down.<sup>6</sup> At this point, because an explanation and foundation should have been disclosed in advance of trial under the Court's orders and Rule 26, the damage amounts themselves must be excluded. Without knowing how the figures were arrived at, it is impossible for Petra to assess and rebut the damage claims. This type of prejudice is precisely what the rules of civil procedure and evidence are designed to prevent. *See Clark v. Klein*, 137 Idaho 154, 156-59, 45 P.3d 810, 812-15 (2002); *Radmer v. Ford Motor Co.*, 120 Idaho 86, 89-91, 813 P.2d 897, 899-902 (1991). Petra is not required to bend over backwards to extract basic information regarding how the City was allegedly damaged by anything Petra did or failed to do. Discovery rules are "intended to insure 'proper litigation' by making the 'trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.'" *Scott and Fetzer Co. v. Dile*, 643 F.2d 670, 674 (9th Cir. 1981) (quoting *Goldman v. Checker Taxi Co.*, 325 F.2d 853, 855 (7th Cir. 1963)) (citations omitted).

The City's failure to disclose how Petra caused any damage to the City or how the City has derived their damage 'estimates' merits sanctions and Petra again requests that the Court exclude evidence relating to the City's damages at trial.

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<sup>5</sup> Walker Affidavit at Exh. 1.

<sup>6</sup> The Court granted Petra's Motion to Strike as impermissibly conclusory this paragraph in the Second Affidavit of Todd Weltner dated July 6, 2010: "With further analysis and discovery, I will be able to obtain actual bids for the repairs necessary for the defects noted above, but based upon my education, training, and experience, I would conservatively estimate the costs of repairs/replacements to be in excess of \$1 million."

Rule 26 provides:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

I.R.C.P. 26(e)(1) and (2). Rule 26 also outlines a permissible sanction for the trial court to impose on a party for non-compliance with the Rule:

If a party fails to seasonably supplement the responses as required in this Rule 26(e), the trial court may exclude the testimony of witnesses or the admission of evidence not disclosed by a required supplementation of the responses of the party.

I.R.C.P. 26(e)(4). The Court is authorized to exclude evidence “as a sanction for a party’s failure to seasonably supplement responses to discovery requests.” *Clark v. Raty*, 137 Idaho 343, 347, 48 P.3d 672, 676 (Ct. App. 2002). A decision to exclude evidence for non-compliance with Rule 26 is within the discretion of the Court. *Id.*

Furthermore, the Court ordered the City and Petra to meet and confer on the City’s damage disclosures no less than 30 days before trial.<sup>7</sup> This occurred at the parties’ mediation on October 18, 2010.<sup>8</sup> The gross deficiency in the City’s disclosures amounts to a violation of the Court’s order that the City submit an adequate disclosure of its damage claims no later than 30

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<sup>7</sup> Walker Nov. Affidavit, at Exh. 3, pp. 53-54.

<sup>8</sup> Walker Nov. 9 Affidavit at ¶ 4.

days before trial. The Idaho Supreme Court has provided the governing standard for compliance with pretrial orders as follows:

A trial court has authority to sanction parties for non-compliance with pretrial orders, and sanctions may include those enumerated in I.R.C.P. 37(b)(2)(B), (C), and (D) for discovery violations. I.R.C.P. 16(l). The imposition of such sanctions is committed to the discretion of the trial court, and we will not overturn such a decision absent a manifest abuse of that discretion. *S. Idaho Prod. Credit Ass'n. v. Astorquia*, 113 Idaho 526, 528, 746 P.2d 985, 987 (1987).

*Edmunds v. Kraner*, 142 Idaho 867, 872, 136 P.3d 338, 343 (2006).

The Court would be well within its discretion to exclude evidence of the City's alleged damages at trial. First, the City stonewalled Petra on the issue of damage for over 16 months, forcing Petra to file a motion to exclude with the Court. Then, the City disclosed a conglomeration of receipts, drawings, contract provisions, and baseless expert opinion – hundreds of documents and photos – just prior to the parties' mediation session.<sup>9</sup> Then, the City's 30(b)(6) designees, with the help of obstructionist tactics employed by the City's counsel, ensured that Petra would not be able to actually discover the basis for the City's damage claims. The damage amounts remain just that – amounts. Petra cannot determine how they were derived based upon the information provided by the City. Nor does Petra know how the City believes anything Petra did or failed to do caused the alleged damages.<sup>10</sup> None of the City's witnesses address causation, an essential element of the City's case. "The purpose of our discovery rules is to facilitate fair and expedient pretrial fact gathering." *Edmunds v. Kraner*, 142 Idaho 867, 873, 136 P.3d 338, 344 (2006).

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<sup>9</sup> Walker Affidavit Nov. 9, at ¶ 3, Exh. 1.

<sup>10</sup> See Petra's companion motion regarding the City's expert disclosures for a more detailed analysis of the City's damage claims.

The City's "hide the ball" tactics run contrary to the purpose of the discovery rules and violate Rule 26. Petra has been prejudiced by the City's failure to disclose the basis of its damage claims. Petra has been unable to adequately prepare for a trial that is, as of the date of this memorandum, just 22 days away. The City's failure to disclose any meaningful, material or relevant evidence regarding its damages has prejudiced Petra's ability to analyze and meet the City's damage claims.

**3.2 Counsel for the City employed obstructionist tactics at the 30(b)(6) depositions regarding damages and the 30(b)(6) designees were largely non-responsive.**

During Petra's depositions of the City's primary experts, there have been at multiple instances of improper coaching or unwarranted objections by counsel for the City, particularly Mr. Trout. At the 30(b)(6) deposition of Mr. Amento, Mr. Trout, counsel for the City, made at least 41 objections during the approximate hour and a half that the deposition took. At the 30(b)(6) deposition of Mr. Baird, Mr. Trout made at least 47 objections during that two-hour deposition. During Mr. Amento's prior deposition, Mr. Trout made 76 objections.<sup>11</sup> In the deposition of Mr. Wetherholt, Mr. Trout made 37 objections.<sup>12</sup> This is just a sampling. The City's obstructionist tactics during depositions have hindered Petra's ability to depose the City's witnesses and discover the basis for the damage claims.

In many of the key depositions in this case, Mr. Trout has brazenly coached the City's witnesses, impairing Petra's efforts to obtain crucial information about the City's case. The testimony of a witness in a deposition is governed by the Idaho Rules of Civil Procedure and

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<sup>11</sup> See Affidavit of Ginny Sam dated Nov. 9, 2010, at [REDACTED]

<sup>12</sup> See Affidavit of Ginny Sam dated Nov. 9, 2010, at [REDACTED]

related judicial precedent. As a general rule, “examination or cross-examination of witnesses may proceed as permitted at the trial.” I.R.C.P. 30(c). During the proceedings, counsel for any party may make objections; however, “[a]ny objection to evidence during a deposition shall be stated concisely and in a **non-argumentative** and **non-suggestive** manner.” I.R.C.P. 30(d)(1) (emphasis added). “Conduct of counsel or other persons during the deposition shall not impede, delay or frustrate the fair examination of the deponent.” *Id.* The Court may sanction a party if it finds an “impediment, delay, or other conduct has frustrated the fair examination of the deponent.” Rule 30(d)(1) incorporates by reference the sanctions listed in Rule 37(b), among which is “prohibiting [a] party from introducing designated matters in evidence” I.R.C.P. 37(b)(2)(B).

The U.S. Supreme Court has consistently upheld the broad nature of F.R.C.P. 26, the federal analog to Idaho’s Rule, observing:

The key phrase in this [Rule 26] definition - “relevant to the subject matter involved in the pending action” - has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. Consistently with the notice-pleading system established by the Rules, ***discovery is not limited to issues raised by the pleadings***, for discovery itself is designed to help define and clarify the issues. ***Nor is discovery limited to the merits of a case***, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.

*Openheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (emphasis added and citations omitted). Depositions are a crucial, powerful tool in that broad discovery process. Idaho law is clear: the “discovery rules were designed to prevent surprise at trial.” *Pearce v. Ollie*, 121 Idaho 539, 552, 826 P.2d 888, 901 (1992). “The discovery rules regarding expert



witnesses were designed to promote fairness and candor.” *Radmer v. Ford Motor Co.*, 120 Idaho 86, 89, 813 P.2d 897, 900 (2006). “Effective cross-examination and rebuttal of expert witnesses requires advanced preparation and knowledge of that expert's testimony.” *Id.*

One much-cited federal case noted:

One of the purposes of the discovery rules in general, and the deposition rules in particular, is to *elicit the facts* of a case before trial. Another purpose is to *even the playing field* somewhat by allowing all parties access to the same information, thereby tending to *prevent trial by surprise*. Depositions serve another purpose as well: the memorialization, the *freezing, of a witness's testimony* at an early stage of the proceedings, before that witness's recollection of the events at issue either has faded or has been altered by intervening events, other discovery, or the helpful suggestions of lawyers.

*Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E. D. Pa. 1993) (emphasis added).

The Utah Supreme Court has indicated that candid responses to discovery questions are critical in litigation and help accomplish the underlying purpose of broad discovery, which is to elicit the relevant facts of the case before trial. *Ellis v. Gilbert*, 429 P.2d 39, 40 (Utah 1967).

The *Ellis* court put it this way:

We are not unaware of the arguments against disclosure, but in weighing them against the various considerations hereinabove discussed in favor of disclosure we have concluded that the ruling of the trial court is correct in *unmasking the truth*, at least to the attorneys and to the court, *so that the proceedings can be carried on with candor and honesty and without cunning and deception*. This serves the desired objective of encouraging informed and enlightened procedure in accordance with the hereinabove stated purpose of our rules, “to secure the just, speedy, and inexpensive determination of every action.”

*Id.* at 42 (emphasis added).

I.R.C.P. 30(d)(1) embraces the philosophy that abusive deposition conduct should not be allowed to hinder the truth-finding process. It reads:

(1) Any **objection** to evidence during a deposition **shall be stated concisely** and in a **non-argumentative** and **non-suggestive manner**. Conduct of counsel or other persons during the deposition shall not impede, delay or frustrate the fair examination of the deponent. If the court finds an impediment, delay or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible appropriate sanctions, including the reasonable costs and attorney's fees incurred by parties as a result thereof, and those listed in Rule 37(b).

I.R.C.P. 30(d)(1) (emphasis added). The Rule proscribes improper deposition objections or conduct that “impedes or delays the examination.” I.R.C.P. 30(d)(2). Many federal and state courts have recognized and prohibited abusive deposition tactics. These courts have recognized the true function of depositions as a discovery conversation between the deposing attorney and the witness. The *Hall* court stated:

The underlying purpose of a deposition is to find out what a witness saw, heard, or did – what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. ***There is no proper need for the witness’s own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answer.*** The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness’s words to mold a legally convenient record. . . . Rather, a lawyer must accept the facts as they develop.

*Hall*, 150 F.R.D. at 528 (emphasis added). The purpose of the deposition is to discover information that will assist both sides to “obtain the fullest possible knowledge of the issues and facts before trial.” *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). Coaching and making numerous frivolous objections necessarily impede this process.

One commentator has defined “coaching” as follows:

“Coaching” encompasses many different forms of behavior at a deposition, including improper objections, improper instructions, and **repeated off-the-**

**record conferences with the deponent . . . .** The “coach,” of course, is the defending lawyer who subtly – or not so subtly – attempts to manipulate the deponent’s answers.

Jeffrey S. White & Eve T. Saltman, *Problem Counsel, Problem Witnesses*, in EFFECTIVE DEPOSITIONS 455, 456 (Henry L. Hecht, ed., American Bar Association, 1997) (emphasis added).

The Advisory Committee notes on the 1993 amendments to Federal Rule 30 recognize that coaching frustrates the quest for truth:

[Rule 30(d)(1)] provides that any objections during a deposition must be made concisely and in a nonargumentative and nonsuggestive manner. Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond.

Fed. R. Civ. P. 30 Advisory Committee’s Notes. Other courts have strongly condemned coaching. *See Eggleston v. Chicago Journeymen Plumbers Local Union No. 130*, 657 F.2d 890, 901-02 (7th Cir. 1981) (stating that a broader standard of relevancy governs depositions and that frivolous objections may be out of order); *Damaj v. Farmers Insurance Co.*, 164 F.R.D. 559, 561 (N.D. Okla. 1995) (objections should be limited to only those that must be raised at a deposition, that assert a privilege, that are necessary to enforce a previous ruling as to scope, or that are necessary for a Rule 30(d) motion).

Following are just some of the egregious examples of how counsel’s frivolous objections alerted the witness as to when he should clam up or be evasive.<sup>13</sup> There are more examples highlighted in blue in the deposition transcript itself:

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<sup>13</sup> Mr. Trout’s objections in this case amount to saying to the witness, “You don’t know. Tell him you don’t know and clam up!” In any case, no court would allow such impromptu guidance from counsel at trial and it should not be allowed in the deposition.

After counsel for Petra showed Mr. Baird Master Project Schedules excerpted from Petra's monthly reports, *which were produced by the City*, Mr. Trout states:

**I'm going to object to the form of the question and the questions which have preceded this related to these documents. The representation, according to the Counsel, was that these were the monthly reports. The documents are incomplete and not consecutively Bates numbered, so these documents have been created in some fashion by the defendant for purposes of creating a false impression.<sup>14</sup>**

One common objection by Mr. Trout came after counsel for Petra asked: "What facts does the City rely on for the statement that Petra failed to obtain any prior approval for Change Order No. 2?" Mr. Trout objects, even though this type of inquiry was why the 30(b)(6) deposition was noticed up in the first place:

**Object to the form of the question to the extent it may call for any form of legal conclusion. You can answer.<sup>15</sup>**

Another common objection by Mr. Trout came after counsel for Petra read an email from Keith Watts, and then asked for Mr. Baird's understanding of the exchange. This example shows how the witness, after hearing Mr. Trout's objection, simply parrots it back:

**Q. Do you understand what Mr. Watts is referring to in that statement?**

**MR. TROUT: Object to the form of the question. Calls for speculation. May call for some kind of legal conclusion. It is also vague and ambiguous.**

**THE WITNESS: Yeah, I'd only be speculating what he's talking about.<sup>16</sup>**

After one question by counsel for Petra, Mr. Trout answers the question:

**An error by who; Petra?<sup>17</sup>**

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<sup>14</sup> Walker Nov. 9 Affidavit at Exh. 10, Baird Deposition 10:6-13.

<sup>15</sup> *Id.* at 14:2-5.

<sup>16</sup> *Id.* at 24:13-19.

Another example of Mr. Trout's violation of Rule 30(d)(1) and his abusive discovery tactics occurs when he attempts to control what can be asked at this deposition.

**MR. TROUT:** Object to the form of the question. It's outside the scope of this witness's 30(b)(6) designation. You've already received the expert reports in this case. You've already received and had an opportunity to depose most, if not all of those experts, Counsel. That's not part of this 30(b)(6) deposition, and he doesn't have to respond to you. This is 30(b)(6) with respect to the position that he stated, and that's all. So you don't get to inquire beyond that.<sup>18</sup>

Here Mr. Trout takes over the role of the deponent and testifies himself as to the City's claims, a gross violation of the rules:

**MR. TROUT:** With all due respect, Counsel, the question has been asked and answered. You've been referred to the expert witness reports and all of the information already provided to your client in this case regarding exactly how the building fails to meet the plan and specification, and the construction under Petra's watch failed to meet the plans and specifications, and Petra's precise responsibility to conduct daily inspection to determine whether or not the work met plan and specification, and best construction practices according to the Construction Management Plan prepared by Petra --<sup>19</sup>

Here again Mr. Trout continues:

**MR. TROUT:** By the way I'm going to object to any questions regarding the proposed first amended complaint. Until the Court grants us leave to file it, I don't think it's appropriate for Counsel to inquire with respect to the first amended complaint. I'll allow questions to be asked, but I want a standing objection to any questions related to it.<sup>20</sup>

...

**MR. TROUT:** I'm going to object and instruct the witness not to answer that question. He is here to respond pursuant to the 30(b)(6) notice and not

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<sup>17</sup> *Id.* at 11:7.

<sup>18</sup> *Id.* at 37:10-19.

<sup>19</sup> *Id.* at 39:11-22.

<sup>20</sup> *Id.* at 42:20-43:1.

**to make any quote/unquote new deals or acceptable arrangements with counsel for the defendant regarding this matter. My objection stands to any questions regarding to the first amended complaint or proposed first amended complaint until such time as the Court allows it, or, Counsel, you are willing to stipulate to its filing.<sup>21</sup>**

The foregoing is wrongful deposition conduct. “It is not the prerogative of counsel, but of the court to rule on objections. Indeed, if counsel were to rule on the propriety questions, oral examination would be quickly reduced to an exasperating cycle of answerless inquiries and court orders.” *Kelvey v. Coughlin*, 625 A.2d 775, 776 (R.I. 1993) (quoting *Shapiro v. Freeman*, 38 F.R.D. 308, 311 (S.D.N.Y.1965)). It is not the role of the attorney defending the deposition to make rulings on relevancy, or other grounds of admissibility. Rule 32(d)(3)(A) does not allow counsel to object on relevancy grounds, much less order a witness not to answer. *See Int’l Union of Elec., Radio & Machine Workers v. Westinghouse Electric Corp.*, 91 F.R.D. 277, 280 (D. D.C. 1981). Furthermore, both Mr. Amento and Mr. Baird were largely non-responsive as a result of counsel’s wrongful coaching, and neither apparently were the person most knowledgeable on the topic, as the City represented to Petra. Mr. Amento was designated as the person most knowledgeable on the City’s damages. Although Amento purportedly drew up the list of amounts attached to counsel’s affidavit as Exhibit 1, his lack of understanding revealed that he was relying entirely upon other persons without having reaching an independent judgment himself. Simply stated, Amento failed to illuminate any of the City’s claimed damages. On a number of occasions, Mr. Amento stated he was relying on Mr. Weltner, Mr. Petsche, or Ms.

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<sup>21</sup> *Id.* at 43:10-20.

Knothe.<sup>22</sup> Therefore, Mr. Amento was not in fact the most knowledgeable person regarding the City's damage claims, or at least he was not willing to share his knowledge with Petra. Examples are highlighted in green the deposition transcript for the Court's information.<sup>23</sup>

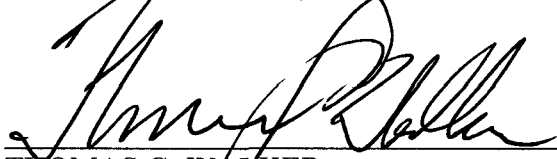
The City's tactics described above and evident in the deposition transcripts, coupled with the late, incomplete, and deficient disclosures by the City regarding its claimed damages, have prejudiced Petra's ability to defend the case. Therefore, Petra requests an order excluding the City from offering evidence of its damages at trial, pursuant to I.R.C.P. 30(d)(1) and 37(b)(2)(B). The end result of the City's damage disclosures – from its stonewalling for 17 months, its insufficient damage disclosures, and its obstructionist tactics at deposition – has been to achieve the opposite of what the discovery rules envision.

#### **4. Conclusion**

Considering the foregoing, Petra again requests the Court to exclude all testimony and documents regarding the City's claimed damages, pursuant to Rules 26, 30(d)(1), and 37(b)(2)(B). Particularly, but not exclusively, Petra requests an order excluding the various cost estimates provided by the City and attached as Exhibit 1 to the counsel's affidavit.<sup>24</sup>

DATED: November 9, 2010.

COSHO HOMPHEY, LLP

  
THOMAS G. WALKER  
Attorneys for Petra Incorporated

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<sup>22</sup> Walker Nov. 9 Affidavit at Exh. 9, Amento Deposition.

<sup>23</sup> *Id.* at Exh. 9, Amento Deposition.


### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 9<sup>th</sup> day of November, 2010, a true and correct copy of  
the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☐ U.S. Mail  
☒ Hand Delivery  
☐ Overnight Courier  
☐ Facsimile: 331-1529  
☐ E-mail:

[

  
THOMAS G. WALKER



NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED \_\_\_\_\_  
P.M. \_\_\_\_\_ 339

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

**Attorneys for Defendant/Counterclaimant, Petra Incorporated**

★★★★★★

**AFFIDAVIT OF THOMAS G. WALKER  
DATED NOVEMBER 9, 2010 IN SUPPORT  
OF PETRA'S RENEWED MOTIONS IN  
LIMINE TO EXCLUDE EVIDENCE OF  
THE CITY'S CLAIMED DAMAGES AND  
IN SUPPORT OF PETRA'S RENEWED  
MOTION TO EXCLUDE THE CITY'S  
EXPERT WITNESSES**

006818

1. I am one of the attorneys of record for the Defendant/Counterclaimant, Petra Incorporated ("Petra"), in the above-entitled action and I make this affidavit based on my own personal knowledge of the facts set forth herein.

2. I submit this affidavit in support of Petra's Renewed Motions in Limine to Exclude Evidence of the City's Claimed Damages and to Exclude Evidence by the City's Experts.

3. Attached as Exhibit 1 is the damage summary disclosed by the City, which was provided to Petra just prior to the parties' October 18, 2010 mediation session.

4. This mediation session constituted the 'meet and confer' on damages ordered by the Court to occur no later than 30 days before trial.

5. Attached as Exhibit 2 is the disclosures made by the City in support of their claim for \$1,650,000 in damages based on the same amount of liquidated damages Petra allegedly failed to collect from 44 prime contractors.

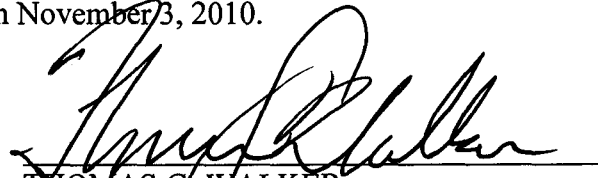
6. Attached as Exhibit 3 is a true and correct copy of the Reporter's Transcript of Proceedings held on September 27, 2010 before Ronald J. Wilper, District Court Judge.

7. Attached as Exhibit 4 is the *Amended Notice of Taking of the Audio-Video Deposition of the City of Meridian, Duces Tecum, Pursuant to I.R.C.P. 30(b)(4) and 30(b)(6)—Damages*, pursuant to which Petra took the deposition of Steven J. Amento.

8. Attached as Exhibit 5 is the *Second Amended Notice of Taking of the Audio-Video Deposition of the City of Meridian, Duces Tecum, Pursuant to I.R.C.P. 30(b)(4) and 30(b)(6)—Claims other than damages*, pursuant to which Petra took the deposition of Ted Baird.

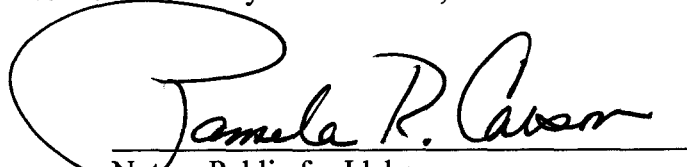
9. Attached as Exhibit 6 is a true and correct copy, with highlighting, of the Audio-Video 30(b)(6) Deposition of Steven J. Amento, taken on November 4, 2010.

10. Attached as Exhibit 7 is a true and correct copy, with highlighting, of the Audio-Video Deposition of Theodore W. Baird, taken on November 3, 2010.

  
THOMAS G. WALKER

SUBSCRIBED AND SWORN to before me this 9th day of November, 2010.



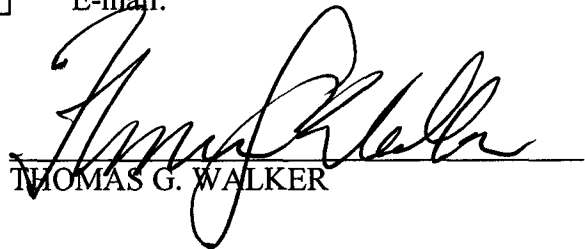
  
Notary Public for Idaho  
Residing at Eagle, Idaho  
My commission expires: March 31, 2016.

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9<sup>th</sup> day of November, 2010, a true and correct copy of  
the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Daniel Loras Glynn  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Overnight Courier
- ☐ Facsimile
- ☐ E-mail:

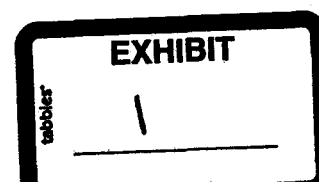
  
THOMAS G. WALKER

Meridian City Hall  
Meridian, ID

Summary

Tab	Issue	Amount
1	Summary	
2	Contractual	
	O / C Agreement S.C. dates	\$ 1,650,000
3	Contract Administration	
	Certificates of Substantial Completion	
	Certificate of Final Payment	
	CO Administration Damages	\$ 97,917
4	Closeout	\$ -
	Warranties	
	Extra Materials	
5	City Costs	
	Direct	\$ 43,790
	Indirect	
6	HVAC	\$ 382,500
7	Roof	\$ 160,000
8	Water Features	\$ 462,500
9	Masonry	\$ 1,252,500
10	Plumbing	\$ 66,500
11	SW drain	\$ 49,000
12	Basement M/E	\$ 114,000
13	Mayor's Reception	\$ 44,000
14	Owner's Criteria	\$ -
		\$ 4,322,708

Tab 1



006822 114378

**Contractual Damages**

Item #	Issue	Performed by	Est. Cost
1	Liquidated Damages	Steve Amento	\$ 1,650,000.00
			\$ 1,650,000.00

101	Repair of "clickers" - should have been a warranty item	\$ 12,950.94	
102	Alpha Masonry CO #2 - providing new cap stones (rework)	\$ 1,079.00	
103	Axelsson (Phase 4) CO #3 - repair const. damage	\$ 3,127.00	
104	Buss Mech CO #2 - reroute roof drains	\$ 2,525.00	
105	Cobblestone CO #2 - rework areas	\$ 2,175.00	
106	Commercial Painting (Phase III) CO #7 (paint prep Rule Steel material)	\$ 2,412.00	
107	Custom Glass (Phase II) (charge for opening not built correctly)	\$ 1,704.00	
108	K & B Fabrication CO #2 (rework to meet code)	\$ 4,197.00	
109	Paige Mech CO #1 (to meet inspector's requirements)	\$ 1,088.00	
110	Rule Steel CO #3 (30 day float was not set against "weather extension"??)	\$ 15,000.00	
111	Schindler Elevator CO #3 (testing / adjustments for construction use)	\$ 1,950.00	
112	Sunshine LS (Phase IV) CO #3 (add topsoil)	\$ 2,721.00	
113	Tamoseal in lieu of PVC liner / S.S. attachments in entry pools	\$ 6,988.10	
	<i>Tamoseal installed (765 sf @ \$1.73 / sf)</i>		\$ (1,323.45)
	<i>PVC liner installed (800 sf @ \$4.35 / sf)</i>		\$ 3,480.00
	<i>SS attachment installed (107 lf @ \$12.50 / lf)</i>		\$ 1,337.50
	<i>net cost difference each pool</i>		\$ 3,494.05
114	Winter conditions	\$ 40,000.00	
	<i>TMC Contract requirement</i>		\$ 40,000.00
	<i>Petra winter conditions invoicing</i>		
		\$ 97,917.04	

Tab 3

			Est. Cost
<b>1</b>	<b>"Extra Materials"</b>		
	N	02780 (Unit Pavers) - Extra Material - 20 each paver	-----
	Ltd	09310-1.7 (Tile) Extra Material - 1 box each	-----
	N	09457-1.9 (Linear Metal Ceiling) 2% Extra Materials	-----
	N	09652-1.7 (Sheet Vinyl) Extra Materials - 2%	-----
	Ltd	09720-1.6 (Wall Covering) Extra Material 5%	-----
	N	09841-1.7 (Acoustical Wall Panel) Extra Material - 2 %	-----
	?	09912-1.7 (Paint) Extra Material - 5 % / 1 gal. min.	-----
	?	09931-1.7 (Stain) Extra Material - 5 % / 1 gal. min.	-----
	N	10265-1.7 (Impact Resist. Wall Protect) Extra Material - 2 %	-----
	N	10651-1.9 (Operable Panel) Extra Material 4 panels	-----
	Y	15325 (Fire Sprinklers) Extra Materials - Special Cabinet / Heads / Wrenches	-----
	N	16425 (Switchboxes) Extra Material - 3 Fuses each type / 1 Fuse puller	-----
<b>2</b>	<b>Special Warranties</b>		
	N	07112-1.8 (Poly Sheet Waterproofing) Special Warranty - 10 years	-----
	N	07132-1.8 (Elast. Sheet Waterproofing) Special Warranty - 10 years	-----
	N	07141-1.4 (Mech. Equip. Rm. Waterproofing) Special Warranty 1 year	-----
	N	07411-1.5 (Metal Roofing) Special Warranty - 20 years	-----
		07412-1.9 (Metal Wall Panel Finish) Special Warranty - 20 years	-----

Tab 4



Closeout

	Y / N	07450-1.9 (Thermoplastic Membrane Roof) Special Warranty - 15 years	-----
	N	07811-1.9 (Sprayed Fire-Resist.) Special Warranty - 2 years	-----
	N	08411-1.7 (Alum. Entry / Storefront) Special Warranty - 20 years	-----
	N	09681-1.7 (Carpet Tile) Special Warranty - 10 years	-----
	N	09841-1.7 (Acoustical Wall Panel) Special Warranty - 2 years	-----
		10431-1.6 (Signage) Special Warranty - 5 years	-----
	N	10505-1.9 (Metal Lockers) Special Warranty - Life of Bldg	-----
	N	10801-1.6 (Toilet / Bath Access.) Special Warranty - 15 years	-----
	N	15440-2.2 (Water Heater) Special Warranty - 3 years	-----
	N	15513-1.6 (Condensing Boilers) Special Warranty - 5 / 10 / 20 years	-----
	N	15626-1.9 (Rotary Screw Chillers) Special Warranty - 5 years	-----
	N	15725-2.3 (Indoor Air Handling) Special Warranty - 5 years	-----
	N	15734-1.6 (Computer Rm. A/C Units) Special Warranty - 5 / 3 years	-----
	N	15738-1.5 (Split Sys. A/C) Special Warranty - 5 years	-----
	N	15765-1.7 (Access Fl. Air Units) Special Warranty - 1 / 10 years	-----
	N	15852-1.4 (Adj. Frequency Drives) Special Warranty - 2 years	-----
	N	15900-2.11 (HVAC Inst. & Controls) Special Warranty - 3 years	-----
	N	16141-2.5 (Snowmelt Heater) Special Warranty - 10 years	-----
	N	16149-2.2 (Low Voltage Devices) Special Warranty - 2 / 10 years	-----
	N	16502-2.2 (Ballasts) Special Warranty - 3 years	-----
	N	16520-1.9 (Dimming System) Special Warranty - 2 years	-----

Tab 4

Closeout

	N	16622-1.8 (Package Generator) Special Warranty - 2 years	-----
	N	16623-3.4 (Transfer Switches) Special Warranty - 2 years	-----
	N	16721-3.6 (Add. Fire Alarm) Warranty - 1 year	-----
	N	16741-4.1 (Telecomm ) Special Warranty - 25 years	-----
	N	16751-4.1 (Access Control) Special Warranty - 2 years (Addendum)	-----
		16761-1.8 (Video Surveillance) Special Warranty - 2 years	-----
<b>3</b>	<b>Submittals / Closeout</b>		
	<i>Most</i>	Provide one year warranty on work	-----
	Ltd	01770-1.3.3 Submit warranties / final certifications / etc	-----
		01770-1.3.5 Submit Project Record Documents / O & M manuals / etc.	-----
	Ltd	01770-1.3.9 Submit test / adjust / balance reports	-----
	Ltd	01770-1.6 B Record Drawings (marked "PROJECT RECORD DRAWING")	-----
	N	01770-1.6 C Record Specifications	-----
	N	01770-1.6 D Record Product Data (in binder)	-----
	N	01770-1.6 E Misc. Record Submittals (in binder)	-----
	<i>Most</i>	01770-1.7 O & M Manuals (in detailed sections as required in Section 01782)	-----
	N	01770-1.8 Warranties (in binders)	-----
		01782-1.4 Submit draft O & M for review 15 days prior to SC.	-----
		01810 - 3.16 (Heery) Commissioning Report & CD	-----
		02810 (Irrigation) - 1 set reproducible drawings	-----
		02840 (Planting) - "as built" drawings	-----

Tab 4

	N	02890 -3.6 (Water Feature) 3 Manuals / 1 efile as built (CADD) / 1 set transparencies / 3 sets as built prints	-----
		15127 (Meters & Guages) - Product Certification	-----
		15950-1.2 / 1.4 / 1.5 / 3.17 (HVAC) Reporting of Test Results	-----
	N	16125-3.6 (Mod. Underfl. Dist.) 4 copies training video	-----
		16622 (Generator) 6 copies O & M Manual	-----

Item #	Issue	Performed by	Est. Cost
1	HVAC		
		BUSS Mechanical	\$ 1,811.15
		Paige Mechanical	\$ 2,436.00
		Hobson Mechanical	\$ -
		Trane Co.	\$ 60.35
		Clima-Tech	\$ -
		Yamas Controls	\$ -
		Water-Tech	\$ 1,117.02
		Analytical Laboratories, Inc.	\$ -
2	Elevator		
		Schindler	\$ -
3	Roofing		
		Western	\$ -
4	Doors & Windows		
		Custom Glass	\$ -
5	Tile & Flooring		
		Schumacher Tile	\$ -
6	Damage / repairs / cleanup <i>sewer / leaks / drains</i>		
		Ultra-Clean	\$ 38,365.94
7	Plumbing		
		DeBest	\$ -
8	Sealants		
		Seal Co	Not on 1st pg
			\$ 43,790.46

HVAC

Item #	Issue	Performed by	Est. Cost
1	Testing / Destructive Testing	Tim Petsche	\$ 10,000.00
	System Testing / runs	Tim Petsche	\$ 10,000.00
		ZGA Oversight	TBD
2	Plans / Specs	Enginnering	TBD
3	Bid mgt / oversight	Laura Knothe	\$ 5,000.00
4	HVAC Repairs / Corrections		\$ 250,000.00
	fully investigate the floor delivery system.		
	verify complete system operation		
	disinfect all systems		
	balance / system		
	test system ( winter / summer)		
	correct chiller isolation issue / mounts		
	close out verification / documentation		
	repair AH leaks		
	contingency		\$ 40,000.00
5	Construction Admin		
		Tim Petsche	\$ 15,000.00
		Laura Knothe	\$ 7,500.00
		Todd Weltner	\$ 7,500.00
		other	TBD
6	Proj. Close out	Tim Petsche	\$ 5,000.00
		Laura Knothe	\$ 5,000.00
		other	TBD
7	Project contingency		\$ 27,500.00
			\$ 382,500.00

Tab 6

Roof

Item #	Issue	Performed by	Est. Cost
1	Destructive Testing		
		Wetherholt Oversight	TBD
2	Plans / Specs	Wetherholt & Associates	TBD
3	Bid mgt / oversight	Laura Knothe	\$ 5,000.00
4	Roof Repairs / Corrections		\$ 100,000.00
	fully investigate the roof via "hands & knees" inspection.		
	drain all patches holding water / reseal		
	provide saddle flashings		
	provide related transitions		
	correct where roofing turns up wall @ mechanical with a termination bar		
	correct areas below the doors, windows and brick ledges		
	provide counter flashing at the base of the brick ledger		
	correct transitional counter flashing at curbs and air handling units		
	complete protection at unfinished / unprotected joint / materials		
	address any and all areas marked on the roof made by inspectors		
	install a reglet where the brick wall or stone overlaps the reglet		
	correct clamping or boot failures		
	Provide roofing pressure relief vents		
	Provide Masonry interface / details		
	correct / reinstall drain clamping per plans		
	correct / reinstall crickets / roof slopes		
	contingency		\$ 20,000.00

5		Construction Admin		
			Wetherholt & Associates	TBD
			Laura Knothe	\$ 7,500.00
			Todd Weltner	\$ 5,000.00
			Other	TBD
6		Proj. Close out	Wetherholt & Associates	TBD
			Laura Knothe	\$ 2,500.00
			Other	TBD
7		Project contingency		\$ 20,000.00
				\$ 160,000.00

Item #	Issue	Performed by	Est. Cost	
1	Destructive Testing	Other	\$10,000.00	
		Anderson Oversight	\$10,000.00	
2	Plans / Specs	Anderson & Associates	\$20,000.00	
3	Bid mgt / oversight	Laura Knothe	\$ 5,000.00	
4	River Repairs		\$90,000.00	
	verify / backfill compaction			
	verify / lock supply liner in place			
	remove gunite			
	liner inspection survey			
	verify / lock liner in place			
	apply gunite			
	reconstruct intake			
	reconstruct skimmers			
	increase flow			
	provide valved split supply			
	redetail / correct joint details			
	acid wash brick / concrete			
	apply waterproofing			
	replace cap stones w / saw cut			
	new weir cap			
	reinstall weir cap			
5	Entry Pool Repairs		\$75,000.00	
	increase flow rate of water falls			
	verify / modify skimmer capacity			
	install balance valves for balanced flows			
	increase filter vault size			
	install upgraded in line filters			
	install add'l v.f. drive pump			
	remove rocks / pressure clean			
	inspect pool base			
	cover all cracks w/ seal strip			
	remove / reset J boxes			
	replace J box fittings w/ wp fittings			
	acid wash brick / concrete			
	apply waterproofing			
	remove / replace skimmers			



Water Features

6	Canal Repairs		\$85,000.00	
	remove / rebuild weirs & surrounding area			
	provide new weirs / reset			
	remove rocks / power clean			
	inspect canals			
	replace light fixtures			
	apply waterproofing			
	replace cap stones w / saw cut			
	rebuild SW canal to meet drawings			
	rebuild basin wall heights or			
	reconstruct water fall heights			
7	System Repairs		\$65,000.00	
	install new surge tank			
	verify return line sizes			
	contingency		\$50,000.00	\$50k contingency
8	Construction Admin	Anderson & Associates	\$7,500.00	
		Laura Knothe	\$ 7,500.00	
		other	TBD	
9	Proj. Close out	Anderson & Associates	\$5,000.00	
		Laura Knothe	\$ 5,000.00	
		other	TBD	
10	Project contingency		\$27,500.00	
			\$462,500.00	

Masonry

Item #	Issue	Performed by	Est. Cost
1	Testing	MTI	\$ 15,000.00
2	Plans / Specs	ZGA	TBD
3	Bid mgt / oversight	Laura Knothe	\$ 5,000.00
4	Masonry Repairs / Corrections		\$ 1,000,000.00
	remove / replace "cast stone" units		
	repair / redo "unsupported" brick at parapet		
	repair / complete unfinished / exposed joints / materials		
	contingency		\$ 125,000.00
5	Construction Admin		
		ZGA	TBD
		Laura Knothe	\$ 10,000.00
		Todd Weltner	\$ 10,000.00
		other	TBD
6	Proj. Close out	ZGA	TBD
		Laura Knothe	\$ 7,500.00
		other	TBD
7	Project contingency		\$ 80,000.00
			\$ 1,252,500.00

Plumbing

Item #	Issue	Performed by	Est. Cost
1	Testing	Todd Weltner	\$ 2,500.00
2	Plans / Specs	ZGA	TBD
3	Bid mgt / oversight	Laura Knothe	\$ 4,000.00
4	Cleanout Repairs / Corrections		\$ 35,000.00
	install missing CO		
	seal channels from exterior		
	paint / touch up		
	contingency		\$ 7,500.00
5	Construction Admin		
		ZGA	TBD
		Laura Knothe	\$ 2,500.00
		Todd Weltner	\$ 2,500.00
		other	TBD
6	Proj. Close out	ZGA	TBD
		Laura Knothe	\$ 2,500.00
		other	TBD
7	Project contingency		\$ 10,000.00
			\$ 66,500.00

SW Drain

Item #	Issue	Performed by	Est. Cost
1	Review	Todd Weltner	\$ 2,500.00
2	Plans / Specs	Others	TBD
3	Bid mgt / oversight	Laura Knothe	\$ 4,000.00
4	Repairs / Corrections		\$ 20,000.00
	remove / replace Gyp Bd. Trim		
	repair / replace rusted FP elements		
	repair / complete unfinished / exposed joints / materials		
	contingency		\$ 5,000.00
5	Construction Admin		
		Laura Knothe	\$ 2,500.00
		Todd Weltner	\$ 2,500.00
		other	TBD
6	Proj. Close out	TW	\$ 2,500.00
		Laura Knothe	\$ 2,500.00
		other	TBD
7	Project contingency		\$ 7,500.00
			\$ 49,000.00

Basement M/E

Item #	Issue	Performed by	Est. Cost
1	Review	Todd Weltner	\$ 2,500.00
2	Plans / Specs	ZGA	TBD
3	Bid mgt / oversight	Laura Knothe	\$ 4,000.00
4	Repairs / Corrections		\$ 75,000.00
	remove backfill / waterproof		
	seal all penetrations		
	repair / redo back fill / landscape		
	repair / replace damaged elec buss base		
	repair / replace damaged FP elements		
	inspect repair grounding bar / wires		
	contingency		\$ 12,500.00
5	Construction Admin		
		Laura Knothe	\$ 2,500.00
		Todd Weltner	\$ 2,500.00
		other	TBD
6	Proj. Close out	Todd Weltner	\$ 2,500.00
		Laura Knothe	\$ 2,500.00
		other	TBD
7	Project contingency		\$ 10,000.00
			\$ 114,000.00

Tab 12

Mayor's Reception

Item #	Issue	Performed by	Est. Cost
1	Testing	Todd Weltner	\$ 2,500.00
2	Plans / Specs	ZGA	TBD
3	Bid mgt / oversight	Laura Knothe	\$ 4,000.00
4	Ceiling Repairs / Corrections		\$ 17,500.00
	provide positive barrier / seal		
	seal channels from exterior		
	redo tube channels by walls		
	paint / touch up		
	contingency		\$ 2,500.00
5	Construction Admin		
		ZGA	TBD
		Laura Knothe	\$ 2,500.00
		Todd Weltner	\$ 2,500.00
		other	TBD
6	Proj. Close out	ZGA	TBD
		Laura Knothe	\$ 2,500.00
		other	TBD
7	Project contingency		\$ 10,000.00
			\$ 44,000.00

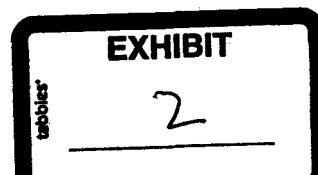
Contractors performing Work at the Site, as submitted, provide for coordination among the Contractors for the portions of the Work each will perform. Construction Manager shall monitor each Contractor's compliance with the safety program and quality assurance plan and report to Owner promptly concerning any deviation therefrom along with recommendations for correction. Construction Manager shall be responsible for coordinating the Contractors for each portion of the Work.

4.7.7 Upon receipt, Construction Manager shall carefully review and examine each Contractor's schedule of values ("Schedule of Values"), together with any supporting documentation or data that Owner, Construction Manager or Architect may require from the Contractor. The purpose of such review and examination shall be to protect Owner from an unbalanced Schedule of Values that allocates greater value to certain elements of the Work than is indicated by such supporting documentation or data or than is reasonable under the circumstances. If the Schedule of Values is not found to be appropriate, or if the supporting documentation or data is deemed to be inadequate, and unless Owner directs Construction Manager to the contrary in writing, the Schedule of Values shall be returned to the Contractor for revision or supporting documentation or data. After making such examination, if the Schedule of Values is found to be appropriate as submitted, or if necessary, as revised, Construction Manager shall sign the Schedule of Values thereby indicating its informed belief that the Schedule of Values constitutes a reasonable, balanced basis for payment of the Contract Price to the Contractor. Construction Manager shall not sign such Schedule of Values in the absence of such belief unless directed to do so, in writing, by Owner.

4.7.8 Construction Manager shall promptly examine, study, approve or otherwise respond to each Contractor's shop drawings and other submittals. Construction Manager's approval of such submittal shall constitute its representation to Owner that such submittal is in general conformance with the Construction Documents, Construction Management Plan and Project Schedule. After Construction Manager's review, Construction Manager shall promptly forward such submittals to Architect, with Construction Manager's comments attached, for review, approval, rejection or other response. Construction Manager shall promptly forward information or actions received from Architect to the appropriate Contractor.

4.7.9 Construction Manager shall carefully observe the Work of each Contractor whenever and wherever necessary, and shall, at a minimum, observe Work at the Project site no less frequently than each standard workday. The purpose of such observations shall be to determine the quality and quantity of the Work in comparison with the requirements of the Construction Contract. In making such observations, Construction Manager shall protect Owner from continuing deficient or defective Work, from continuing unexcused delays in the schedule, and from overpayment to a Contractor. Following each observation, Construction Manager shall submit a written report of such observation to Owner and Architect together with any appropriate comments or recommendations.

4.7.10 Construction Manager shall reject, in writing, any Work of a Contractor that is not in compliance with the Construction Documents unless otherwise directed by Owner in writing.



- c.) Development of a preliminary plan for the construction of the project including; site access control, prime contractor scheduling, material deliveries, staging and waste control.
- d.) Internal Project Team meetings to review implementation of existing design and develop recommendations to the City for budget and design considerations prior to the bidding and construction phases of the project.
- e.) Review and publish bid packages for the scopes of work in each phase of the project. Assist City in the bidding process. Control the pre-bid RFI and addendum process to minimize the impact on the project constructability and optimize value engineering suggestions within the Idaho Public Works Construction Law statutes.
- f.) Review the bid results in detail with the City and collect any additional information to insure that the project value is in keeping with the intent of the bid documents prior to making recommendations for acceptance by the City.

III.) The Construction Phase of the Quality Management Plan is where the planning and organization of the Construction and Construction Management Team come together. The Petra Team is specifically responsible for:

- a.) The collection, review and processing of the submittal packages prior to and after review by the Design Team to confirm that the intent of the design is being met, in accordance with the Project Communications Plan.
- b.) Weekly progress meetings on site with all prime contractors on site or scheduled to be on site to review work in progress, work quality controls by trade, quality assurance testing requirements that are scheduled or need to be scheduled.

~~c.) Daily inspection for correctness and quality of work being installed by the Petra Project Management team confirming that the work is being installed in accordance with the contract design and best construction practices.~~

- d.) Monthly review with the City of the quality of the work in place, the schedule, any value engineering or design modification suggestions submitted by the Construction Team and how each of these would impact the quality, construction schedule and long term performance of the project.

IV.) The Commissioning & Occupancy Phase of the Quality Management Plan is the stage where the City will learn how the City Hall Building works and begin occupying the facility. The Quality Management Plan focuses on the steps necessary to insure that all equipment and building components are operating correctly including:

- a.) Assist the Commissioning Agent in the distribution of the Operations & Maintenance Manuals (O&M) from the prime contractors as required by the construction documents. Participate in the training process and documentation to insure a smooth transition between the construction and operation of the facility.
- b.) Schedule and direct the City and the Design Team in the Punch list process and then manage the punch list to insure that any corrections are completed in a timely manner in accordance with the best construction practices.
- c.) Implement the contract warranty procedure, and address any and all warranty calls from the City in a timely manner to minimize negative impact on the City and to insure proper material and equipment warranties and operation. Log and track all warranty reports to identify trends and notify the City of any potential patent or latent product or workmanship issues that may require further action by the City.
- d.) At the end of the one-year builder's warranty, deliver to the City a binder containing all warranty call back information, results and any warranty extensions or warranty claim documentation.



# AIA® Document A101/CMa™ – 1992

## **Standard Form of Agreement Between Owner and Contractor** *where the basis of payment is a STIPULATED SUM*

### **AGREEMENT**

made as of the 17 day of JULY in the year of 2007  
(In words, indicate day, month and year)

**BETWEEN** the Owner:  
(Name and address)

CITY OF MERIDIAN  
33 East Idaho Avenue  
Meridian, Idaho 83642-2300  
and the Contractor:  
(Name and address)

Hobson Fabricating Corporation  
6428 Business Way  
Boise, Idaho 83716

For the following Project:  
(Include detailed description of Project, location, address and scope.)

New Meridian City Hall  
33 East Broadway Avenue  
Meridian, Idaho 83642

An approximately 100,000 square foot, multi-story city hall office building with a basement.

The Construction Manager is:  
(Name and address)

PETRA INCORPORATED  
1097 N. Rosario Street  
Meridian, Idaho 83646

The Architect is:  
(Name and address)

LCA ARCHITECTS, P.A.  
1221 Shoreline Lane  
Boise, Idaho 83702

The Owner and Contractor agree as set forth below.

### **ADDITIONS AND DELETIONS:**

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

The 1992 Edition of AIA Document A201/CMa, General Conditions of the Contract for Construction, Construction Manager-Adviser Edition, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

Init.

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User Notes:

(3540483872)

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006842

## ARTICLE 1 THE CONTRACT DOCUMENTS

The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement; these form the Contract, and are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Contract Documents, other than Modifications, appears in Article 9.

## ARTICLE 2 THE WORK OF THIS CONTRACT

The Contractor shall execute the entire Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others, or as follows:

## ARTICLE 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 3.1 The date of commencement is the date from which the Contract Time of Section 3.2 is measured, and shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner.

*(Paragraphs deleted)*

September 15, 2007

§ 3.2 The Contractor shall achieve Substantial Completion of the entire Work not later than \_\_\_\_\_ days after the Date of Commencement.

*(Insert the calendar date or number of calendar days after the date of commencement. Also insert any requirements for earlier Substantial Completion of certain portions of the Work, if not stated elsewhere in the Contract Documents.)*

### Portion of Work

The complete work of providing all material, equipment, tools, labor and supervision for a complete and operational dry side HVAC system in cooperation with the plumbing scope of work; including all duct, fittings, valves, gauges, meters, piping, insulation, diffusers, registers, grilles, instrumentation and controls, ventilators, and related components in accordance with the plans and specifications.

Substantial Completion date  
July 1, 2008

### Division I — General Requirements

Section 07841 — Through-Penetration Firestop Systems

Section 07842 — Fire-Resistive Joint Systems

Section 15053 — Common Work Results for HVAC

Section 15057 — Common Motor Requirements for Plumbing Equipment

Section 15058 — Common Motor Requirements for HVAC

Section 15062 — Hangers and Supports for HVAC Piping and Equipment

Section 15077 — Identification for HVAC Piping and Equipment

Section 15082 — Plumbing Insulation

Section 15738 — Split-System Air-Conditioning Unit

Init.

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User Notes:

Section 15725 – Modular Indoor Central-Station Air-Handling Units  
 Section 15734 – Computer Room Air Conditioning Units  
 Section 15762 – Unit Heaters  
 Section 15765 – Access Floor Air Terminal Units  
 Section 15815 – Metal Ducts  
 Section 15820 – Duct Accessories  
 Section 15838 – Power Ventilators  
 Section 15852 – Adjustable (Variable) Frequency Drives  
 Section 15855 – Diffusers, Registers, and Grilles  
 Section 15900 – HVAC Instrumentation and Controls  
 Section 15940 – Sequence of Operations  
 Section 15950 – Testing, Adjusting and Balancing (Air Flow)  
 Section 15955 – Mechanical Systems Commissioning

, subject to adjustments of this Contract Time as provided in the Contract Documents.  
*(Insert provisions, if any, for liquidated damages relating to failure to complete on time.)*

The Contractor acknowledges and agrees that the Owner will suffer financial loss in an amount that is difficult to quantify if the Work is not substantially complete on the date set forth in the Contract Documents. The Owner shall have the option to assess liquidated damages against the Contractor (and its surety, if any) in an amount of Five Hundred & NO/100 Dollars (\$500.00) per calendar day, for each calendar day of delay until the Work is substantially complete. The Contractor acknowledges and agrees that the amounts set forth above are a reasonable estimate of the damages that will likely be incurred by Owner in the event the Work is not substantially complete by the date set forth in the Contract Documents, and not a penalty. If responsibility for a delay in substantial completion shared by the Contractor and others, Owner may reasonably apportion the damages between each responsible party. The right to assess liquidated damages is in addition to, and not in limitation of, any right or remedy available to the Owner or to protect the Owner to address delay by the Contractor, whether such right or remedy is under law, in equity or under Contract Documents.

#### ARTICLE 4 CONTRACT SUM

§ 4.1 The Owner shall pay the Contractor in current funds for the Contractor's performance of the Contract the Contract Sum of Two Million Sixty Thousand Dollars & NO/100 (\$ 2,060,000.00), subject to additions and deductions as provided in the Contract Documents.

§ 4.2 The Contract Sum is based upon the following alternates, if any, which are described in the Contract Documents and are hereby accepted by the Owner:  
*(State the numbers or other identification of accepted alternates. If decisions on other alternates are to be made by the Owner subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount for each and the date until which that amount is valid.)*

§ 4.3 Unit prices, if any, are as follows:

Description	Units	Price (\$ 0.00)
-------------	-------	-----------------

#### ARTICLE 5 PROGRESS PAYMENTS

§ 5.1 Based upon Applications for Payment submitted by the Contractor to the Construction Manager, and upon Project Applications and Certificates for Payment issued by the Construction Manager and Architect, the Owner

init.

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 User Notes:

(3540483872)

**KIM J. TROUT, ISB #2468**

**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.**

**225 North 9th Street, Suite 820**

**P.O. Box 1097**

**Boise, ID 83701**

**Telephone: (208) 331-1170**

**Facsimile: (208) 331-1529**

**Attorneys for Plaintiff**

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,**

**Plaintiff,**

**v.**

**PETRA, INCORPORATED, an Idaho  
Corporation,**

**Defendant.**

**Case No. CV OC 09-7257**

**AFFIDAVIT OF STEVEN J. AMENTO  
DATED SEPTEMBER 20, 2010 FILED IN  
SUPPORT OF PLAINTIFF'S MOTION  
FOR LEAVE TO AMEND COMPLAINT**

State of Idaho )  
                  )ss  
County of Ada )

**STEVEN J. AMENTO, being duly sworn upon oath, deposes and says:**

1. I am above the age of 18 years and have personal knowledge of the facts contained herein.

1. I am a co-founder and President of Corke Amento, Inc.

2. I am an experienced construction manager in the State of Washington, having managed several major projects over the course of my career. In my role as President, I have directly or indirectly managed over 70 construction projects which have an aggregate value in excess of \$100 Million. My C.V. has been previously submitted to the Court along with my prior Affidavit, all of which contains my professional qualifications.

3. As stated in my previous Affidavit, I have undertaken an examination of the Project Records for the Meridian City Hall Project, as they relate to the issue of Petra's contract administration, particularly with respect to payments to Prime Contractors and Liquidated Damages.
4. Each Prime Contract (AIA-A-101 Form), for the Meridian City Hall Project contained a \$500 per day liquidated damage clause, in the event the Prime Contractor failed to achieve the required Substantial Completion Date established by the Prime Contract.
5. Petra was, as the Construction Manager pursuant to the Construction Management Agreement, responsible for Contract Administration of the Prime Contracts.
6. Petra, pursuant to the Construction Management Plan created by Petra and section 9.8 of the AIA201CMA contract, and sound construction management was responsible to insure that the Architect, Lombard Conrad Architects, appropriately provided a Certificate of Substantial Completion for each Prime Contractor as part of its Contract Administration.
7. I have not seen any evidence Certificates of Substantial Completion were issued by Lombard Conrad for any Prime Contractor on the Meridian City Hall Project.
8. The Certificate of Substantial Completion is a very important document because it establishes, amongst other things, the responsibilities and rights of the Owner and Contractor for damage to the work, warranty commencement, insurance obligations, uncompleted work and the end date for liquidated damage calculation and assessment.
9. Petra failed to ensure Certificates of Substantial Completion were issued.
10. Despite the fact that Certificates were not issued, Petra issued Change Orders which contained a date of "Substantial Completion" to 34 of the 44 Prime Contractors. (I have not determined how the 34 were selected by Petra). The dates inserted by Petra on the various Change Orders do not appear to be supported by project documentation and/or schedule

analyses (if they exist) undertaken by Petra. The only exception is the Change Order to Rule Steel whereas Petra conducted an evaluation of Rule's performance and recommended assessment of liquidated damages which was eventually incorporated into the monetary value of the Change Order. I know of no reason why Petra would prepare a liquidated damages analysis solely for Rule Steel, and not perform similar analyses for the other Prime Contractors, and ensure the Substantial Completion Certificate process provided in Section 9.8 of the Contract was properly executed. (See Exhibit A for a summary of the Substantial Completion Dates for each Prime Contractor.)

11. Absent such analyses, Petra appears to have arbitrarily inserted "Substantial Completion" dates on the Change Orders which Petra then presented to the City for signature. For example, the contract for MJ's Backhoe contains a substantial completion date of 7/22/2007 and Petra inserted a completion date of 8/28/2008 on Change Order #3 to MJ's Backhoe, which essentially extended the contractual completion date 403 calendar days. This inserted completion date is contrary to data found on Petra's "Master Production Schedule" dated 5/2/08 which shows completion of site backfill and commencement of subsequent concrete activities in July of 2007. Another example of Petra's arbitrary contract extension involves TMC Masonry:

Contractual Substantial Completion Date:	12/21/2007
Date inserted by Petra on C.O. #3:	8/28/2008
Resulting Contract Completion Extension:	251 Calendar Days
Completion Date for Exterior Masonry on Petra schedule of 5/2/08:	02/22/2008

In both examples there is no apparent explanation or support for the substantial completion dates Petra choose to insert on these Change Orders and present to the City for signature. (See Exhibit B Petra's Master Production Schedule dated 5/2/08.)

12. Petra's failure to follow the contractual requirements and provide reasonable contract administration and construction management has severely hindered the City's ability to assess liquidated damages against those Prime Contractors who failed to complete their work on, or before their contractual substantial completion dates. Petra, without City knowledge or knowing approval, waived by its conduct in recommending Change Orders with arbitrary completion dates.
13. Having signed the various Change Orders, the City has arguably waived rights against those Contractors and is now confronted with a set of facts and circumstances which I predict will be utilized by those Contractors in defense of liquidated damage claims asserted by the City.
14. Each Prime Contract includes a provision for liquidated damages of \$500 per calendar day.
15. Without the benefit of the Certificates of Substantial Completion and a contemporaneous schedule analysis, the City's damages are difficult to determine and will require costly and time-consuming legal and consulting efforts underwritten by the City.
16. One damage calculation is based upon the difference between the original planned date of building occupancy and the actual date the of City occupancy. Petra's CMP schedule of 2/12/2007 showed 8/1/2008 as the planned occupancy date for the City Hall. The City actually occupied the building on 10/15/2008, 75 calendar days later than planned. Under the terms of each Prime Contract, the City is entitled to liquidated damages, but now cannot ascertain or determine which Contractors are responsible for the delayed occupancy, much less which Contractor failed to complete its work on or before its Substantial Completion Date. It is possible each of the 44 Prime Contractors is jointly responsible for the delay; thus the City would assert an aggregate claim of \$1,650,000 (44contractors x 75days x \$500/day) for liquidated damages. Predictably, the 34 Contractor with signed Change Orders would argue the City has waived its rights to liquidated damages and the other 10

Contractors would argue project delays are the responsibility of other Contractors and the City. The City may be required to sue every, or many of the, forty-four Contractors as a means to resolve the liquidated damage claim. In the unfortunate event the City has to pursue each Contractor, the ultimate outcome and damages awarded to the City (or negotiated) will depend upon a variety of factors, primarily how much time, energy and resources the City has available to resolve a problem which was caused solely by Petra's failure to follow the contract provisions.

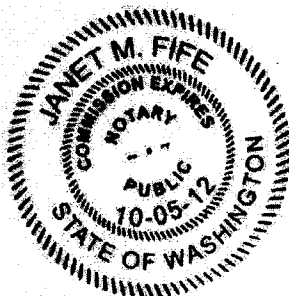
17. Petra's failure to require the issuance of the Certificates of Substantial Completion, combined with the arbitrary date of "Substantial Completion" in the Change Orders is a material breach of the Construction Management Agreement, and a material breach of the fiduciary duty contained therein, and is also a material breach of the duty of due care applicable to Petra's conduct on the Meridian City Hall Project.

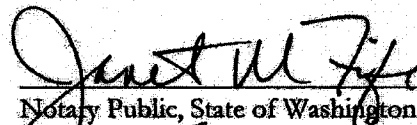
FURTHER YOUR AFFIANT SAYETH NAUGHT.

By: 

STEVEN J. AMENTO

Subscribed and sworn to before me this 20<sup>th</sup> day of September, 2010.





Notary Public, State of Washington

Residing at: EDMONDS, WA

My commission expires: 10-05-12



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this \_\_\_\_ day of September, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSH O HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P.O. Box 9518  
Boise, Idaho 83707-9518  
Direct Facsimile: (208) 639-5609

Hand Delivered  
U.S. Mail  
Fax  
Email

<input checked="checked" type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

\_\_\_\_\_  
Kim J. Trout

**Exhibit A**

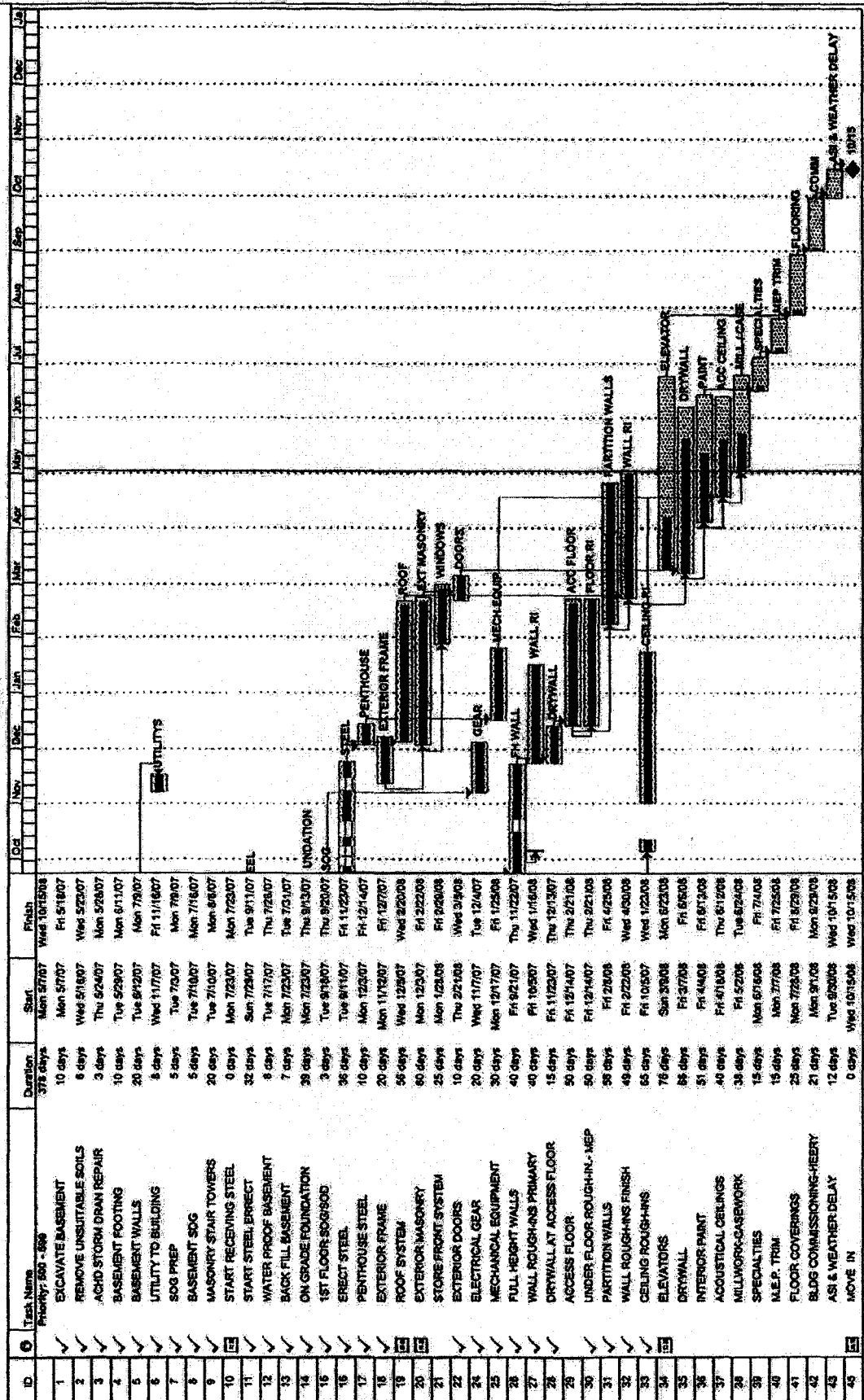
**Meridian City Hall-Substantial Completion Worksheet**

Prepared 9/10/10

Contract #	Contractor	Description of Work	Substantial Completion Date (Per Prime Contract)	Substantial Completion Date (Per Change Order)	Change Order #	Resulting Contract Extension (Calendar Days)
<b>Phase 2: Main Building</b>						
P2-1	MJ's Backhoe	Sitework	7/22/2007	8/28/2008	CO 3	403
P2-2	Sidewalks LLC	Site concrete	10/14/2007	8/28/2008	CO 5	367
P2-3	TMC	Bldg Masonry	12/21/2007	8/28/2008	CO 3	251
P2-4	Rule Steel	Steel Fab & Erect	10/5/2010	1/11/2008	CO 3	-998
P2-5	None					
P2-6	Arch. Building Supply	Doors & Frames	1/7/2008	8/28/2008	CO 4	234
P2-7	Am. Wallcover	Framing / Drywall	10/5/2007	No Change Order		0
P2-8	Custom Glass Co.	Alum. Storefronts & Glazing	2/15/2008	No Change Order		0
P2-9	Western Roofing	Roofing	11/23/2007	8/28/2008	CO 2	279
P2-10	Schindler Elevator	Elevators	2/29/2008	8/28/2008	CO 3	181
P2-11	SEALCO	Moisture Protection	7/15/2007	8/28/2008	CO 3	410
<b>Phase 3: Main Building</b>						
P3-1	B & B Steel	Handrails	7/1/2008	8/28/2008	CO 4	58
P3-2	Am. Wallcover	Carpentry	7/1/2008	No Change Order		0
P3-3	ID Custom Wood Prod.	Millwork & Cabinets	7/1/2008	8/28/2008	CO 5	58
P3-4	Custom Glass, Inc	Interior Storefront & Glazing	7/1/2008	8/28/2008	CO 2	58
P3-5	None					
P3-6	Arch. Building Supply	Doors, Frames & Hardware	7/1/2008	8/28/2008	CO 9	58
P3-7	Crawford Door of ID	OH & Colling Doors	7/1/2008	No Change Order		0
P3-8	Am. Wallcover	Drywall	7/1/2008	8/28/2008	CO 6	58
P3-9	Schumacher & CO.	Ceramic Tile	7/1/2008	8/28/2008	CO 1	58
P3-10	Designer Floors	Flooring Systems	7/1/2008	8/28/2008	CO 2	58
P3-11	Commercial Painting	Painting	7/1/2008	8/28/2008	CO 7	58
P3-12	SBI Contracting, Inc.	Specialties	7/1/2008	8/28/2008	CO 6	58
P3-13	Pac West Interiors	Access Flooring	7/1/2008	No Change Order		0
P3-14	Integrating Interiors	Window Coverings	7/1/2008	8/28/2008	CO 1	58
P3-15	The Masonry Center	Oper. Partitions	7/1/2008	No Change Order		0
P3-16	A/V Systems	Astronics	7/31/2008	8/28/2008	CO 6	28
P3-17	Simola Grinnell	Fire Protection	7/1/2008	8/28/2008	CO 5	58
P3-18	BLISS	Plumbing	7/1/2008	8/28/2008	CO 7	58
P3-19	Hobson	HVAC	7/1/2008	8/28/2008	CO 6	58
P3-20	Tri-State	Electrical / alarm	7/1/2008	8/28/2008	CO 6	58
P3a-21	TTE - Precon	Telecommunications	7/1/2008	8/28/2008	CO 6	58
P3a-22	APEX	Security & Access	7/31/2008	8/28/2008	CO 3	28
<b>Phase 4: SNAT Plaza</b>						
P4-1	Terra West	Earthwork	7/15/2008	10/31/2008	CO 1	108
P4-2	Sunshine Landscape	Landscaping	7/15/2008	8/28/2008	CO 3	44
P4a-3	M R Miller	Water Features	8/1/2008	8/28/2008	CO 3	27
P4-4	Alpha Masonry	Plaza Stone	7/15/2008	8/28/2008	CO 3	44
P4-5	K & B Fabrication	Plaza Metal & Railings	7/15/2008	8/28/2008	CO 2	44
P4-6	Palgo Mechanical	Plaza HVAC	7/15/2008	8/28/2008	CO 1	44
P4-7	Tri State Electric	Plaza Electrical	7/15/2008	8/28/2008	CO 1	44
P4-8	Am. Wallcover	Drywall & Framing	7/15/2008	No Change Order		0
P4-9	ProTech	Roofing	7/15/2008	No Change Order		0
P4-10	None					
P4-11	SEALCO	Moisture Protection	8/15/2007	No Change Order		0
P4-12	Commercial Painting	Painting	8/1/2008	No Change Order		0
P4-13	Aerden Concrete	Concrete	8/1/2008	8/28/2008	CO 3	27
P4-14	Cobblestone Conc	Concrete Pavers	8/15/2008	8/15/2008	CO 2	0
						<b>2,435</b>

EXHIBIT B

# McKIDIAN CITY HALL MASTER PRODUCTION SCHEDULE Fri 5/2/08



net production & s 10/10/07  
Fri 5/2/08

Task Critical Task

Progress Adherence

Summary Rolled Up Task Rolled Up Progress

SPR Weather Days List

Page 1

**Exhibit A**

**Meridian City Hall-Substantial Completion Worksheet**

Revised 10/5/10

Contract #	Contractor	Description of Work	Substantial Completion Date (Per Prime Contract)	Substantial Completion Date (Per Change Order)	Change Order #	Resulting Contract Extension (Calendar Days)
P2 - 1	M/s Backhoe	Site work	7/22/2007	8/28/2008	CO 3	403
P2 - 2	Sidewalks LLC	Site concrete	10/14/2007	8/28/2008	CO 5	367
P2 - 3	TMC	Bldg Masonry	12/21/2007	8/28/2008	CO 3	251
P2 - 4	Rule Steel	Steel Fab & Erect	10/5/2007	1/11/2008	CO 3	98
P2 - 5	None					
P2 - 6	Arch. Building Supply	Doors & Frames	1/7/2008	8/28/2008	CO 4	234
P2 - 7	Am. Wallcover	Framing / Drywall	10/5/2007	No Change Order		0
P2 - 8	Custom Glass Co.	Alum. Storefronts & Glazing	2/15/2008	No Change Order		0
P2 - 9	Western Roofing	Roofing	11/23/2007	8/28/2008	CO 2	279
P2 - 10	Schindler Elevator	Elevators	2/29/2008	8/28/2008	CO 3	181
P2 - 11	SEALCO	Moisture Protection	7/15/2007	8/28/2008	CO 3	410
P3 - 1	B & B Steel	Handrails	7/1/2008	8/28/2008	CO 4	58
P3 - 2	Am. Wallcover	Carpentry	7/1/2008	No Change Order		0
P3 - 3	ID Custom Wood Prod.	Millwork & Cabinets	7/1/2008	8/28/2008	CO 5	58
P3 - 4	Custom Glass, Inc.	Interior Storefront & Glazing	7/1/2008	8/28/2008	CO 2	58
P3 - 5	None					
P3 - 6	Arch. Building Supply	Doors, Frames & Hardware	7/1/2008	8/28/2008	CO 9	58
P3 - 7	Crawford Door of ID	OH & Colling Doors	7/1/2008	No Change Order		0
P3 - 8	Am. Wallcover	Drywall	7/1/2008	8/28/2008	CO 6	58
P3 - 9	Schomacher & CO.	Ceramic Tile	7/1/2008	8/28/2008	CO 1	58
P3 - 10	Designer Floors	Flooring Systems	7/1/2008	8/28/2008	CO 2	58
P3 - 11	Commercial Painting	Painting	7/1/2008	8/28/2008	CO 7	58
P3 - 12	SBI Contracting, Inc.	Specilities	7/1/2008	8/28/2008	CO 6	58
P3 - 13	Pac West Interiors	Access Flooring	7/1/2008	No Change Order		0
P3 - 14	Integrating Interiors	Window Coverings	7/1/2008	8/28/2008	CO 1	58
P3 - 15	The Masonry Center	Oper. Partitions	7/1/2008	No Change Order		0
P3 - 16	A / V Systems	Aesthetics	7/31/2008	8/28/2008	CO 6	28
P3 - 17	Simlex-Ginnell	Fire Protection	7/1/2008	8/28/2008	CO 5	58
P3 - 18	BUSS	Plumbing	7/1/2008	8/28/2008	CO 7	58
P3 - 19	Hobson	HVAC	7/1/2008	8/28/2008	CO 6	58
P3 - 20	Tri-State	Electrical / alarm	7/1/2008	8/28/2008	CO 6	58
P3a - 21	TTE - Precon	Telecommunications	7/1/2008	8/28/2008	CO 6	58
P3a - 22	APEX	Security & Access	7/31/2008	8/28/2008	CO 3	28
P4 - 1	Terra-West	Earthwork	7/15/2008	10/31/2008	CO 1	108
P4 - 2	Sunshine Landscape	Landscapeing	7/15/2008	8/28/2008	CO 3	44
P4a - 3	M R Miller	Water Features	8/1/2008	8/28/2008	CO 3	27
P4 - 4	Alpha Masonry	Plaza Stone	7/15/2008	8/28/2008	CO 3	44
P4 - 5	K & B Fabrication	Plaza Metal & Railings	7/15/2008	8/28/2008	CO 2	44
P4 - 6	Paige Mechanical	Plaza HVAC	7/15/2008	8/28/2008	CO 1	44
P4 - 7	TRI State Electric	Plaza Electrical	7/15/2008	8/28/2008	CO 1	44
P4 - 8	Am. Wallcover	Drywall & Framing	7/15/2008	No Change Order		0
P4 - 9	ProTech	Roofing	7/15/2008	No Change Order		0
P4 - 10	None					
P4 - 11	SEALCO	Moisture Protection	6/15/2007	No Change Order		0
P4 - 12	Commercial Painting	Painting	8/1/2008	No Change Order		0
P4 - 13	Aedson Concrete	Concrete	8/1/2008	8/28/2008	CO 3	27
P4 - 14	Cobblestone Conc	Concrete Pavers	8/15/2008	8/15/2008	CO 2	0
						<b>3,531</b>

DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
IN AND FOR THE COUNTY OF ADA

----- x Case No. CVOC-09-07257  
:  
THE CITY OF MERIDIAN, an Idaho :  
Municipal Corporation, :  
:  
Plaintiff/Counterdefendant, : MOTION HEARING  
:  
vs. :  
:  
PETRA INCORPORATED, an Idaho :  
corporation, :  
:  
Defendant/Counterclaimant. :  
:  
----- x

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Held on September 27, 2010, before  
Ronald J. Wilper, District Court Judge.

A P P E A R A N C E S

For Plaintiff/Counterdefendant  
Kim J. Trout  
TROUT JONES GLEDHILL FUHRMAN, P.A.  
225 North 9th Street, Suite 820  
Boise, Idaho 83701

For Defendant/Counterclaimant Petra  
Thomas G. Walker  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
Boise, Idaho 83707-9518

Reported by  
Dianne E. Cromwell  
CSR No. 21

**EXHIBIT**

3

2

1 BOISE, IDAHO  
2 September 27, 2010, 1:37 p.m.  
3  
4 THE COURT: We'll take up Meridian versus  
5 Petra, CVOC-09-07257. This is the time scheduled  
6 for hearing on Meridian's motion to dismiss and  
7 both parties have motions in limine.  
8 Mr. Walker appears on behalf of the  
9 Defendant Petra. Mr. Trout appears on behalf of  
10 the Plaintiff City of Meridian.  
11 Mr. Trout, I guess you're up on your  
12 motion to dismiss on the tort claim issue.  
13 MR. TROUT: Thank you, Judge. Good  
14 afternoon, Your Honor.  
15 THE COURT: Good afternoon.  
16 MR. TROUT: Your Honor, I think the  
17 fundamentals of this motion are very clear. As a  
18 matter of fact, Petra has never provided a tort  
19 claim notice pursuant to 5219 or Title 6 to the  
20 city. That fact is undisputed in this matter.  
21 And the significance of that fact I think is borne  
22 out by both the statute and the case law in the  
23 state of Idaho.  
24 The case law specifically requires that  
25 once a party has, quote, knowledge of facts which

4

1 claims their fee is based as a percentage of cost,  
2 knew or should have known.  
3 And there's little doubt that  
4 January 15 of 2007 is the first key date for the  
5 court to consider, and as it states in the  
6 McQuillen versus City of Ammon case, that's the  
7 date that triggers the 180-day requirement.  
8 If you forget about that date, if you  
9 forget about February 12, the second cost  
10 estimate, if you forget about April 3, the third  
11 cost estimate, and you forget about July 12, 2007,  
12 the fourth cost estimate, you could look to a  
13 second unequivocal date, which is November 5, 2007  
14 where Petra submits, quote/unquote, it's notice of  
15 change order for an increase in their fee.  
16 If you ignored the first four dates,  
17 you can't ignore November 5, and the 180-day  
18 period would start there. And contrary to the  
19 position that I expect Mr. Walker to take, which  
20 is the same one he espoused at the prior hearing,  
21 we didn't know we had a claim until the city  
22 denied payment. Well, that's not what the case  
23 law says, and it's not what the statute says.  
24 And in fact, in Mitchell versus Bingham  
25 Memorial Hospital, which we cited to the court at

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1 would put a reasonably prudent person on inquiry  
2 notice, it triggers the 180-day period.  
3 That's a direct quote from McQuillen  
4 versus the City of Ammon at 113 Idaho 719,  
5 page 722.  
6 Now, when you put that into the context  
7 of our case, Judge, the question is: When would a  
8 reasonably prudent person in Petra's position know  
9 of facts giving rise to their claim? And the  
10 answer is, on or about January 15, 2007.  
11 The benefit of having this hearing in  
12 near proximity to our last hearing, Judge, is that  
13 the court has the benefit of having seen Petra's  
14 cost estimate, the first of which was submitted on  
15 January 15 of 2007 and which was approximately I  
16 think \$3 million greater than the amounts stated  
17 in the construction management agreement.  
18 Now, since we all know and have known  
19 from the day that Petra filed its counterclaim in  
20 this matter that their claim is based in principle  
21 part on the increased cost of this project, it  
22 isn't necessarily when a reasonably prudent person  
23 would have known. It's when Petra in its  
24 fiduciary capacity as a construction expert  
25 providing a cost estimate to the city, which

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1 130 Idaho 420, page 423, it specifically states:  
2 "A claimant is not required to know all the facts  
3 and details of a claim because such a prerequisite  
4 would allow the claimant to delay completion of  
5 their investigation before triggering the notice  
6 requirement."  
7 If you followed Petra's argument that  
8 we didn't know it was a claim until the city  
9 denied payment, then that's exactly what the court  
10 said you cannot do in the Mitchell case because  
11 Petra could control the timeframe in which it  
12 asked for payment and hence received the denial.  
13 And that's clearly not the purpose of  
14 the statute. And in fact, the purpose of the  
15 statute as stated in the Pounds decision is  
16 exactly why in this circumstance with this set of  
17 facts the act has to be strictly enforced.  
18 In order to serve the primary purpose  
19 of the act and to, quote, save needless expense  
20 and litigation by providing an opportunity for  
21 amicable resolution of the differences between the  
22 parties, then notice must be given and it must be  
23 given early.  
24 And under this set of circumstances, I  
25 find it either disingenuous or impossible to

<p style="text-align: center;">6</p> <p>1 believe that if as stated in the multiple 2 affidavits submitted to the court and the multiple 3 pleadings submitted to the court, Petra knew from 4 the time they signed this contract that their fee 5 was going to be based on a percentage of total 6 cost, which is what the mantra has been from day 7 one. It's always been 4.7 percent of the cost. 8         If in fact that's true, then on 9 January 15, 2007 they knew they had a claim for an 10 increase in the amount of their fee, and the 11 180-day notice provision was triggered, and they 12 must have given the notice within that period of 13 time. 14         I'll address two additional points. 15 The first point is, Petra is going to assert that 16 while the federal statute says a counterclaim is 17 sufficient notice, and therefore, the state ought 18 to follow the federal rule. 19         Well, unfortunately we have to give due 20 deference to the legislature who is presumed to 21 know what it is doing and what the state of the 22 law is, and at the time they passed 5219 and the 23 Idaho Tort Claims Act, the federal statute was in 24 existence and allowed by statute a counterclaim to 25 be sufficient to comply. And the Idaho</p>	<p style="text-align: center;">7</p> <p>1 legislature chose not to follow the federal 2 format. 3         And as a result, we have case law in 4 our state, the Knudsen decision, Knudsen versus 5 Agee at 128 Idaho 776, which specifically says the 6 court would not look to a federal court 7 interpretation of a federal statute -- in that 8 case a wiretap statute -- for the creation of a 9 discovery exception where a similar state statute 10 does not expressly contain such an exception. 11         We have an identical situation here, 12 and the filing of the counterclaim simply doesn't 13 meet the standard, and there's a good reason. 14         The good reason is, the same principle 15 espoused in the Pounds decision that identifies 16 the whole purpose for giving a notice and giving 17 it early. Give the parties a fair opportunity to 18 resolve this, give the city an opportunity to 19 begin their investigation not in 2009 but in 2007, 20 specifically in January of 2007 when they should 21 have given notice of the increase in fee to begin 22 with under their fiduciary responsibility to the 23 city. 24         It's for those reasons, Your Honor, 25 that we respectfully ask that the court apply as</p>
<p style="text-align: center;">8</p> <p>1 the Supreme Court has the tort claims notice in 2 5219 to dismiss all of Petra's claims with 3 prejudice. Thank you. 4         THE COURT: Thank you very much, Mr. Trout. 5         Mr. Walker? 6         MR. WALKER: Thank you, Your Honor. Well, 7 here we are, Your Honor, more than 17 months of 8 litigating this case and after the parties have 9 incurred more than a million dollars in costs and 10 fees, Meridian asserts it was not sufficiently put 11 on notice of Petra's damages claim against the 12 city because it failed to file a claim under 13 Idaho Code Section 50-219 and 6-901 and the 14 following subsections. 15         Well, first of all, Your Honor, the 16 counterclaim for the construction manager's fee 17 and the reimbursable expenses seeks specific 18 performance of the construction management 19 agreement, not money damages. 20         So Petra's counterclaim in that regard 21 does not fall within the purview of the Idaho Tort 22 Claims Act. Now, admittedly, Your Honor, Petra's 23 claims for lost past and future earnings and lost 24 business and investment opportunities are a claim 25 for damages, but as I'll point out in a minute,</p>	<p style="text-align: center;">9</p> <p>1 Your Honor, Petra substantially complied with the 2 Idaho Tort Claims Act in any event. 3         Now, back to the equitable adjustment 4 language in paragraph 7 of the construction 5 management agreement. That paragraph provides 6 that a change shall entitle the construction 7 manager to an equitable adjustment in the schedule 8 of performance, the construction manager's fees, 9 and/or the not-to-exceed limits for reimbursable 10 expenses. So the essence, Your Honor, of Petra's 11 claim is equitable in nature and not one for money 12 damages. 13         And as I mentioned, so the bottom line 14 with respect to the request for the construction 15 manager's fee and the expenses are simply a 16 request that the court specifically enforce the 17 contract. 18         Now, in this regard, Idaho Code 19 Section 50-219 states that, "All claims for 20 damages against the city must be filed as 21 prescribed by Chapter 9, Title 6 Idaho Code." 22 Idaho Code Section 6-904 provides that, "A claim 23 means any written demand to recover money damages 24 from a governmental entity or its employee, which 25 any person is legally entitled to recover under</p>

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1 this act as compensation for the negligent or  
 2 otherwise wrongful act or omission of the  
 3 governmental entity or its employee."  
 4 So putting the equitable adjustment  
 5 language in the equitable remedy aside, let's look  
 6 at Petra's substantial compliance with the Idaho  
 7 Torts Claims Act.  
 8 As Mr. Trout mentioned in his argument,  
 9 Petra's position is is that the claim didn't arise  
 10 until change order number 2 was denied on  
 11 February 24, 2009. So at the outset, it's  
 12 necessary for us to determine what constitutes a  
 13 claim in this case.  
 14 And there are four sources, Your Honor,  
 15 that lead us to the determination that change  
 16 order number 2 was not a claim until it was  
 17 denied.  
 18 The first source is the construction  
 19 management agreement itself. The second source is  
 20 the custom and practice in the construction  
 21 industry. The third source is the party's course  
 22 of dealing during the project period, and the  
 23 fourth source is the definition of claim contained  
 24 in the Idaho Tort Claims Act itself.  
 25 Now, regarding the construction

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1 custom and practice in the industry, as Mr. Bauer,  
 2 our expert, our construction management expert,  
 3 stated in his September 13, 2010 affidavit at  
 4 paragraph 45, and I quote: "My review of the  
 5 affidavits and documents filed and served by the  
 6 city in this case indicates that the city asserts  
 7 that Petra's change order number 2 is a claim.  
 8 This is incorrect under the standards applicable  
 9 to contractors and construction managers. A  
 10 change order request does not become a claim until  
 11 it is denied by the owner.  
 12 "Likewise, the construction management  
 13 agreement defines a claim as a 'dispute or other  
 14 matter in question.'"  
 15 Now, moving on, Your Honor, to the  
 16 third source, the parties' course of dealing  
 17 during the project period. Now, the parties did  
 18 not treat change order number 1 as a claim that  
 19 triggered the mediation provisions of  
 20 paragraph 8.2. Change order number 1 was  
 21 submitted after the contaminated and unsuitable  
 22 soil was removed and the city paid an additional  
 23 construction management fee to Petra for managing  
 24 that removal project.  
 25 In addition, Your Honor, no other

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1 management agreement, paragraph 8.1 of the  
 2 agreement states, and I quote: "In the event that  
 3 any claim, dispute, or other matter in question  
 4 between the owner and construction manager arising  
 5 out of or related to this agreement or breach  
 6 hereof ('a claim'), owner and construction manager  
 7 shall first endeavor to resolve the claim through  
 8 direct discussions."  
 9 So, Your Honor, applying the canon of  
 10 construction used ejusdem generis, which means, as  
 11 the court knows, of the same class, and more  
 12 particularly it means when a general word or  
 13 phrase proceeds or follows a list of specifics,  
 14 the general word or phrase will be interpreted to  
 15 include only those items of the same type as those  
 16 listed.  
 17 And the second legal principle of  
 18 construction, noscitur a sociis, which means that  
 19 words are known by the company they keep, and  
 20 we've cited the court to Idaho Supreme Court case  
 21 State versus Richards with regard to that. These  
 22 two canons of construction confirm that a matter  
 23 is not a claim under the construction management  
 24 agreement until it is disputed.  
 25 Now, regarding the construction or the

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1 contractor change order -- and there was some 150  
 2 of them -- was treated as a claim subject to  
 3 mediation.  
 4 Now, finally moving to the statute,  
 5 Your Honor, the fourth source. The definition of  
 6 claim is contained in Idaho Code Section 6-902,  
 7 and it reads, and I've already alluded to part of  
 8 this: "Claim means any written demand to recover  
 9 money damages from a governmental entity or its  
 10 employee, which any person is legally entitled to  
 11 recover under this act as compensation for the  
 12 negligent or otherwise wrongful act or omission of  
 13 the governmental entity or its employees when  
 14 acting within the course and scope of his  
 15 employment."  
 16 It's clear, Your Honor, that neither  
 17 Petra's submission of change order number 2, nor  
 18 the city's request for additional information  
 19 which took place prior to February 24, 2009, was  
 20 wrongful. It's simply the matter of dealing with  
 21 the change order in the ordinary course.  
 22 So, Your Honor, our position is that  
 23 the claim arose on February 24, 2009, the date  
 24 that Meridian refused to pay the change order.  
 25 And the time for filing the notice under the Idaho



<p style="text-align: center;">14</p> <p>1 statutes began to run on that date.</p> <p>2 So focusing on that date, then Petra</p> <p>3 substantially complied with the notice</p> <p>4 requirements under the Idaho statutes, and that</p> <p>5 position is supported by my March 16, 2009 letter</p> <p>6 to Bill Nary, the city attorney, requesting</p> <p>7 mediation. And that was sent certainly within 180</p> <p>8 days. That was sent within 20 days of the change</p> <p>9 order was denied and the claim arose.</p> <p>10 In addition to that, Petra filed and</p> <p>11 served its answer and counterclaim on May 6, 2009,</p> <p>12 which is also within the 120-day -- or 180-day</p> <p>13 period, setting forth its damages claims and its</p> <p>14 claims with respect to the construction management</p> <p>15 fee and reimbursable expenses.</p> <p>16 Now, additionally, and this is germane</p> <p>17 to the cases cited in our briefing, there were</p> <p>18 substantial communications between Mr. Trout and I</p> <p>19 regarding this matter early on in the case and</p> <p>20 certainly before the 180 days expired.</p> <p>21 And finally, Your Honor, Petra filed</p> <p>22 and served its first amended answer and</p> <p>23 counterclaim on August 21, 2009, which was also</p> <p>24 within the 180-day period that expired on</p> <p>25 August 23 of 2009. So all three of those events</p>	<p style="text-align: center;">15</p> <p>1 occurred, those events of notice occurred, prior</p> <p>2 to the expiration of the 180 days.</p> <p>3 Now, in looking at the purpose of the</p> <p>4 statute, the Court of Appeals in Cox versus City</p> <p>5 of Sandpoint, which we've cited in our briefing,</p> <p>6 the court explained, and I quote: "The primary</p> <p>7 function of notice under the Idaho Tort Claims Act</p> <p>8 is to put the government entity on notice that a</p> <p>9 claim against it is being prosecuted and thus</p> <p>10 apprise it of the need to preserve evidence and</p> <p>11 perhaps prepare a defense."</p> <p>12 There's no suggestion here at this</p> <p>13 point, Your Honor, that Meridian was not able to</p> <p>14 preserve evidence and prepare a defense. There's</p> <p>15 no suggestion that Meridian was blind-sided by</p> <p>16 Petra's claims and not afforded the opportunity to</p> <p>17 address each and every one of them outside of</p> <p>18 litigation.</p> <p>19 On the contrary, Your Honor. While my</p> <p>20 request for mediation made on behalf of Petra was</p> <p>21 pending, the city brought this matter into court</p> <p>22 by filing its complaint on April 16, 2009. And</p> <p>23 they did this, the city did this, notwithstanding</p> <p>24 the requirement in the construction management</p> <p>25 agreement that, quote, all claims shall be subject</p>
<p style="text-align: center;">16</p> <p>1 to mediation as a condition precedent to the</p> <p>2 institution of legal or equitable proceedings by</p> <p>3 either party. Requests for mediation shall be</p> <p>4 filed in writing with the other party to this</p> <p>5 agreement." And it required that it be filed</p> <p>6 within 21 days, and we complied with that by my</p> <p>7 letter of March 16, 2009 which was served on the</p> <p>8 city attorney Bill Nary on March 16.</p> <p>9 And, Your Honor, despite the</p> <p>10 requirement that the city mediate and despite our</p> <p>11 request for mediation, the city refused to</p> <p>12 mediate.</p> <p>13 In addition, the notice requirements of</p> <p>14 the Idaho Tort Claims Act do not apply to</p> <p>15 counterclaims in our judgment, Your Honor,</p> <p>16 particularly compulsory counterclaims that are</p> <p>17 filed within the 180-day period. Now, there's no</p> <p>18 published opinion in Idaho holding that the notice</p> <p>19 requirements of the Idaho Tort Claims Act apply to</p> <p>20 counterclaims. However, other jurisdictions and</p> <p>21 notably Oregon, our sister state, have addressed</p> <p>22 this issue, and they've answered that a</p> <p>23 counterclaim satisfies the acts requirements.</p> <p>24 In the Oregon case, Urban Renewal</p> <p>25 Agency of the City of Coos Bay versus Lacky, 275</p>	<p style="text-align: center;">17</p> <p>1 Oregon 35, a 1976 case, the Oregon court recited</p> <p>2 the purposes of the Oregon tort claim statute,</p> <p>3 which is identical in essence to the Idaho tort</p> <p>4 claim statute.</p> <p>5 And the court stated: "The purpose of</p> <p>6 the statute is, one, to save needless expense and</p> <p>7 litigation by providing an opportunity for</p> <p>8 amicable resolution of the differences between the</p> <p>9 parties, as in mediation; two, allow authorities</p> <p>10 to conduct a full investigation into the cause of</p> <p>11 the injury in order to determine the extent of the</p> <p>12 state's liability, if any; and third, to allow the</p> <p>13 state to prepare defenses."</p> <p>14 Now, Your Honor, we've stated several</p> <p>15 other reasons in our briefing supporting our</p> <p>16 opposition to the city's motion to dismiss based</p> <p>17 upon the Idaho Tort Claims Act, and we'll rely on</p> <p>18 our briefing for the balance of our argument.</p> <p>19 THE COURT: Mr. Walker, just so I'm certain</p> <p>20 about your argument, now, to the extent that your</p> <p>21 counterclaim seeks specific performance of the</p> <p>22 contract, your contention is that that portion of</p> <p>23 your claim is not subject to the Tort Claim Act in</p> <p>24 any effect.</p> <p>25 MR. WALKER: Correct.</p>

1 THE COURT: It's a contract-based cause of  
2 action, not a tort. And with respect to the  
3 counterclaims alleging negligence, and so forth,  
4 in seeking and containing a prayer for relief  
5 seeking damages sounding in tort, your contention  
6 is that your cause of action didn't accrue until  
7 February of '09 when your claim was denied or when  
8 your requests for additional moneys for change  
9 order number 2 was actually denied, and that would  
10 trigger your cause of action sounding in tort.

11 And then your letter of the 16th of March  
12 constituted compliance with the Tort Claim Act.

13 MR. WALKER: Correct, and also compliance  
14 with the construction management agreement.

15 THE COURT: And in any event, if the court  
16 were to follow the authority that you've cited,  
17 the persuasive authority that you have cited from  
18 the state of Oregon, a compulsory counterclaim  
19 wouldn't be subject to the Tort Claim Act in any  
20 event.

21 MR. WALKER: Or it would satisfy the notice  
22 requirements, Your Honor.

23 THE COURT: Right. And that was filed on  
24 May 6.

25 MR. WALKER: May 6 the first one and

1 they have to satisfy the conditions precedent to  
2 any kind of claim for specific performance under  
3 any interpretation of contract law.

4 And let's take a look at what the  
5 specific provision is. This is in section 7.  
6 This is the, quote/unquote, equitable adjustment  
7 section that was just cited to you by Petra, and  
8 it says: "Prior to providing any additional  
9 services, the construction manager shall notify  
10 the owner of the proposed change in services and  
11 receive the owner's approval for the change."

12 There was no evidence in this case that  
13 that was complied with with respect to section 7.  
14 None, zero, no evidence.

15 And there is no evidence that can be  
16 created today to show compliance with that  
17 specific condition precedent.

18 THE COURT: Well, Mr. Trout, as I understood  
19 the purpose of the hearing, your motion to dismiss  
20 was premised on your contention that Petra failed  
21 to comply with the Tort Claim Act. What you're  
22 arguing here is that they failed – that really  
23 their claims, their contract claims, should be  
24 dismissed based on their failure to satisfy this  
25 condition precedent contained in the contract.

1 August 21 the second one.

2 THE COURT: And both of them are within six  
3 months if, again, the clock starts ticking on that  
4 180-day time period on March 16.

5 MR. WALKER: February 24, 2009. Yes,  
6 Your Honor.

7 THE COURT: That's what I meant. Thank you  
8 very much, counsel.

9 And, Mr. Trout, it's your motion, so  
10 I'll give you the final word on this issue.

11 MR. TROUT: I would like to show the court a  
12 couple of things if I can.

13 First of all, Your Honor, I think it's  
14 fundamentally important to recognize that this  
15 whole notion of equitable is, and I'll use another  
16 Latin term, ipse dixit, I say it, therefore it is.

17 And there is no question that what  
18 Petra seeks as a result of it's, quote/unquote,  
19 claim or, quote/unquote, action for specific  
20 performance, is money. They're not asking us to  
21 specifically perform in any other fashion but to  
22 provide money in a very large amount.

23 And so if we're going to look at what  
24 they're talking about in section 7 for specific  
25 performance, let's just take an example. Then

1 MR. TROUT: It's actually two-fold. Since  
2 counsel raised the argument in terms of the nature  
3 of the claim that was being made, what I'm saying  
4 is, the notice that would be required is a notice  
5 within 180 days of the date that they begin  
6 providing additional services. That's the basis  
7 for their claim: We provided additional services  
8 under the contract. We're entitled to be paid  
9 whether you call it an equitable adjustment or  
10 whether you call it what they're calling it, which  
11 is 4.7 percent of the increase in cost.

12 Either one of those things was known by  
13 Petra well in advance of February of 2009 either  
14 by way of this section of the agreement or by way  
15 of the contention that they have continually made  
16 to this court that we're entitled to an increase  
17 in our fee based on 4.7 percent of the actual  
18 construction cost.

19 So the question then becomes: Did they  
20 wait until February of 2009 to begin providing the  
21 additional service? I don't think so. Exhibit 2,  
22 which is the claim, notice of claim, and the  
23 document that they submit to the city saying,  
24 "This is why you should pay us more money," starts  
25 accumulating their time for, quote/unquote,

1 additional services on July 31 of 2007 in the form  
2 of 3.5 hours charged to Wes Bettis, the project  
3 manager.

4 Now, when should a reasonably prudent  
5 construction manager, charged with a fiduciary  
6 duty to this city, be on notice of facts giving  
7 rise to the claim? Well, when they begin  
8 providing the additional service if section 7 is  
9 the basis upon which they want to do it or when  
10 they know of an increase in cost, which was  
11 January 15 of 2007. Neither of those dates is in  
12 February of 2009. Can't get there from here. The  
13 facts don't support their position.

14 And so whether you call this some kind  
15 of equitable claim, which still seeks money  
16 damages, or whether you call it a breach of  
17 contract claim, which still seeks money damages,  
18 the fundamental question is, if you're going to  
19 seek money from the city, you go back to the city  
20 of Ammon case and say, "When does a reasonably  
21 prudent person in their position have notice of  
22 facts which would give rise to the claim?"

23 Those are the two dates, January 15 or  
24 the day they began providing additional services,  
25 even though they didn't meet that condition of the

1 your satisfaction is look to how the Supreme Court  
2 of Idaho answered that question to its  
3 satisfaction in the Udell decision.

4 They said: "In our view, the sovereign  
5 immunity protected by the act, speaking of the  
6 Tort Claims Act, should not be dissipated by  
7 ad hoc waivers."

8 Now, each of the items, that each of  
9 those four items are specifically ad hoc waivers  
10 that Petra would like the court to adopt as  
11 exceptions to the rule. And that's clearly not  
12 the case in Idaho, and it clearly can't be the  
13 case in Idaho. It is answered by the Udell  
14 decision. It's also answered in another way by  
15 another decision of the state. Kelso Irwin, PA  
16 versus the State Insurance Fund, 134 Idaho 130, in  
17 which the court, Supreme Court, uniformly stated:  
18 "It has been long recognized that the general rule  
19 is that equitable estoppel may not be invoked  
20 against a government or public agency functioning  
21 in the governmental capacity."

22 There's absolutely no doubt, none, that  
23 the provision of notice under 5219 and the Idaho  
24 Tort Claims Act to -- not the city attorney, not  
25 me, not anybody except the city clerk who is

1 contract. They knew they were providing  
2 additional services. And therefore, there's no  
3 basis to argue that the date moves forward to  
4 2009, some seven months after -- seven months,  
5 Judge, after October 15, 2008 when they say the  
6 project was complete.

7 It defies credibility for Petra to  
8 argue that they had no knowledge until seven  
9 months after.

10 THE COURT: Mr. Trout, do me a favor and  
11 leave that up, will you? I want to hear from  
12 Mr. Walker on this issue, if you don't mind.

13 MR. TROUT: I will. Happy to leave that up.

14 I think the next thing for the court to  
15 recognize is that what they're suggesting to the  
16 court in very plain language is that the,  
17 quote/unquote, four items, custom and practice,  
18 course of dealing, section 8.1, all constitute  
19 what are called waivers, all waivers.

20 And the language that I would like the  
21 court to focus on is specifically in our  
22 memorandum, and it consists of two items. Number  
23 1 -- and of course, the passage of time, which is  
24 I think the big point that counsel wanted to make.  
25 And all you have to do to answer that question to

1 charged as the recipient of the appropriate notice  
2 can be anything other than compliance with the  
3 act.

4 There is no substantial compliance, and  
5 no case cited by Petra that says substantial  
6 compliance means I can talk to the city attorney  
7 in a meeting. I can talk to Mr. Trout who is  
8 representing them. I can send a letter to the  
9 city attorney.

10 You won't find a single case in Idaho  
11 that says anything other than an appropriate  
12 notice sent to the clerk of the municipal entity  
13 within 180 days of the date the claim was made  
14 aware of by the claimant is anything but  
15 compliant.

16 And under that set of circumstances,  
17 all four of the items cited by Petra as excuses,  
18 custom and trade, which is, by the way, a legal  
19 opinion by Mr. Bauer and not one that is subject  
20 to the court's deference, some kind of notice  
21 under section 8.1 which specifically says, it  
22 doesn't define claim as just a claim for money  
23 damages. It says, "or other matter in question  
24 arising out of or related to this agreement." And  
25 then it says not "and," but it says, "or the

26

1 breach hereof."

2 Under that set of circumstances and the

3 contractual definition of claim, was this a matter

4 in question? Well, it's a matter in question if

5 prior to providing any additional service the

6 construction manager shall notify of the proposed

7 change. And under section 8.1, which I'll point

8 out to the court, it isn't 180 days, Judge. It's

9 the 21.

10 THE COURT: Well, let me ask you this.

11 Given the provision in the contract that requires

12 any dispute over any claim to be submitted for

13 discussion -- right? -- it seems to me that that

14 might allow the city to continue with the

15 discussion of this claim and this dispute for a

16 lengthy period of time, perhaps for 181 days, and

17 then say, "Discussion is over, we're not paying."

18 And then come back and say, "Sorry.

19 You didn't comply with the Tort Claim Act. You

20 can't sue us either."

21 MR. TROUT: There's no provision in the

22 statute that talks about, quote/unquote, wrongful

23 inducement by the city. There's no provision in

24 the case law that talks about some kind of

25 wrongful inducement by any city. There's no

28

1 January 15 of 2007 or it's got to be based upon

2 the date they started providing the additional

3 services and the notice was required to the owner

4 then.

5 One last item.

6 THE COURT: Go ahead, and then I'll have one

7 question.

8 MR. TROUT: The last item is this. It

9 addresses the point that was being made about the

10 passage of time. And I'll give you two pieces,

11 Judge. The first is, the Udell case specifically

12 deals with the passage of time: "If the state is

13 immune from liability because of a failure of the

14 claimant to comply with the notice requirements of

15 the Tort Claims Act, the immunity may be raised at

16 any time."

17 No question about that. That's a

18 specific finding.

19 THE COURT: Because it is jurisdictional.

20 MR. TROUT: That's because it's

21 jurisdictional. And secondarily, I would ask the

22 court to turn its attention, because I thought

23 Petra might raise this issue to a case called

24 Trees, just like the ones that stand with leaves,

25 versus Kersey, which is at 56 P.2d Third 765. It

27

1 provision anywhere and no case law cited by Petra

2 anywhere, nor any facts submitted in this case

3 that one could conclude that the city was acting

4 in some kind of wrongful or deceitful way and

5 didn't act at all. The bottom line is, it's not a

6 notice requirement on behalf of the city.

7 It's a notice requirement on behalf of

8 the claimant. And whether the claimant complies

9 or not, the case law is very clear in our state,

10 is that it's absolutely jurisdictional in order

11 for that determination to be made.

12 And I'll quote specifically, Judge,

13 from the case of Udell. It says, "The

14 jurisdictional significance of the prerequisite

15 notice of the Idaho Tort Claims Act."

16 It doesn't allow for anything other

17 than notice by the claimant. And therefore,

18 assuming that we had all of those other facts that

19 you suggested, Judge, there might be some case law

20 somewhere that says a wrongful inducement not to

21 file the notice of claim might be appropriate.

22 Well, we don't have that case here, and

23 we don't have that case law here. What we have is

24 a flat failure to comply, and it's got to be based

25 on one of two things: It's got to be based on

29

1 is a 2002 decision of the Supreme Court.

2 And what is important about the Kersey

3 case is, claims like contract claims that might be

4 illegal or claims that fail under the Tort Claims

5 Act can be raised at any time, and in fact, "The

6 court has a duty to raise the issue of illegality

7 sua sponte."

8 And so for Petra to argue that there's

9 any kind of waiver, that there's any kind of,

10 quote/unquote, equitable right that is not being

11 adjusted here does not resolve the question of

12 illegality.

13 THE COURT: And the question I had for you,

14 Mr. Trout, was, I usually see the defense of

15 failure to comply with the Tort Claim Act, the

16 notice requirement of the Tort Claim Act, in a

17 pure tort setting. And here it appears that the

18 allegation here is sounding in breach of contract

19 as opposed to tort.

20 And you look at the language of the

21 Tort Claim Act itself which talks about, hey, any

22 claim, we're not talking just about tort claims.

23 We're talking about breach of contract, failure to

24 pay a bill is, even though that's a contract-based

25 cause action, it doesn't make any difference. Any

<p style="text-align: right;">30</p> <p>1 demand for money that you claim that you're owed  2 has to comply with the Tort Claim Act.  3 MR. TROUT: That's correct. And the other  4 jurisdictions that have looked at that issue or  5 are uniformly of the same notion, and in fact  6 we've cited three different cases to the court:  7 City of Racine versus Waste Facility Siting Board,  8 a Wisconsin decision. "Notice of claim is a  9 necessary prerequisite to all actions, all  10 actions, brought against the entity as listed in  11 the statute, including governmental subdivision,  12 whether tort or nontort, whether brought as an  13 initial claim, counterclaim, or a cross claim."  14 Nassau County versus Wolfo. The fact  15 that it was the county which first initiated this  16 litigation does not relieve the defendant from  17 complying with the notice of claim provisions  18 where the defendant seeks affirmative relief by  19 way of a counterclaim.  20 Department of Transportation versus  21 PSC Resources. "Joining those other jurisdictions  22 which have barred the assertion of counterclaims  23 where the defendant has not previously complied  24 with a notice of claim provision of municipal  25 ordinances."</p>	<p style="text-align: right;">31</p> <p>1 Those cases in which they directly  2 address the question of whether all means all have  3 uniformly said it does in fact all means all.  4 Whether contract-based, tort-based, equitable, or  5 otherwise, the statute has the fundamental purpose  6 as stated in Pounds, you must give the notice once  7 you're aware of any fact that gives rise to the  8 claim.  9 THE COURT: And finally, with respect to  10 Mr. Walker's citation to the Oregon case law which  11 he contends is persuasive and the State of Idaho  12 would likely follow the same reasoning, are you  13 prepared to address that with respect to these  14 mandatory counterclaims?  15 MR. TROUT: The Oregon case and the Oregon  16 case law takes deference to the federal statute.  17 THE COURT: Where Idaho does not.  18 MR. TROUT: And Idaho does not. The Knudsen  19 decision specifically says Idaho won't give  20 deference to the federal statute for the reason  21 that the Idaho legislature is presumed to know of  22 which it speaks, makes the law which it intends.  23 THE COURT: Okay. Thank you. Appreciate  24 it.  25 Mr. Walker, I wanted to give you</p>
<p style="text-align: right;">32</p> <p>1 another opportunity to respond, because Mr. Trout  2 has been kind enough to put on the big screen here  3 in the courtroom page 16 of the contract and the  4 part that he has highlighted which reads: "Prior  5 to providing any additional services, the  6 construction manager, Petra in this case, shall  7 notify the owner or the city of the proposed  8 change in services and receive owner's approval  9 for the change."  10 How would you respond to that? Failure  11 of condition precedent.  12 MR. WALKER: Contrary to Mr. Trout's  13 representation, there are affidavit testimony that  14 we have submitted in support of our various  15 motions which indicate that the notice was  16 provided to the city prior to rendering any  17 additional services. The court can review those  18 affidavits. And so the condition precedent was  19 met.  20 And in addition, it's important to  21 point out and we point this out in our briefing is  22 that paragraph 7 does not include the requirement  23 that the notice be in writing, and that was  24 intentional, and the argument is in our briefing  25 with regard to that.</p>	<p style="text-align: right;">33</p> <p>1 And the reason for that, Your Honor, is  2 that this was a complex project where literally  3 many, many decisions, maybe as many 50 or 100  4 decisions were made on a daily basis, including  5 changes in Petra's responsibility as a  6 construction manager.  7 So specifically, because it would have  8 been impossible to build the building, if we had  9 to give written notice every time there was going  10 to be some additional service, the project would  11 have never been built.  12 Secondly, with regard to either a  13 change order is a claim or it's not. The city  14 can't have it both ways. Well, regardless of what  15 date we use, if you use July 30, 2007 as the date  16 when Petra should have -- we don't agree with  17 that but should have become aware -- Petra filed  18 its official notice on November 5, 2007, which is  19 within 180 days of July 30, '07.  20 And in addition, if November 5, 2007 is  21 the operative date, Petra filed its change order  22 number 2 on April 8, 2008, which is five months  23 down the road, less than 180 days, Your Honor.  24 So irrespective of what the city's  25 position is with regard to the start date, we</p>

1 think that it's clear that the start date is  
2 February 24. And our argument with respect to the  
3 definition of claim is not a waiver argument.  
4 It's a definitional argument. The claim is  
5 defined in the construction management agreement.  
6 It's defined in the custom and practice of the  
7 industry. It is defined in the statute which is  
8 important, and it is defined by the party's course  
9 of dealing.

10 With regard to providing service to the  
11 city clerk, the court will review the cases that  
12 we cited in our brief. For example, the Cox  
13 versus Sandpoint, the notice was substantively met  
14 by letters to the city, just addressed to the  
15 city, and billings to the city.

16 And in this case, it's peculiar because  
17 my folks, the Petra representatives, in particular  
18 Gene Bennett, and I believe this is in one of his  
19 affidavits, attempted to contact and discuss this  
20 matter with Keith Watts after Mr. Trout was  
21 engaged. And I received an email from Mr. Trout  
22 instructing that all communications should go  
23 through Mr. Trout and not directly to the city.

24 And so we followed that rule which was  
25 reasonable, I suppose, under the circumstances,

1 rebuttal with respect to that last argument that  
2 Mr. Walker made.

3 MR. TROUT: I do. I've now heard it not  
4 less than four times in the hearings in this case,  
5 and I think it's time we put to bed what the real  
6 answer to the question is. I keep hearing that  
7 it's not a waiver argument, but in fact it has to  
8 act as a waiver. Otherwise, there can't be  
9 compliance because the notice was never served on  
10 the city clerk as required by law.

11 And specifically section 10.17 says:  
12 "This is the entire agreement between the parties  
13 with respect to the matters covered herein,  
14 supersedes all prior written and oral. Any  
15 waivers hereunder must be in writing."

16 All of this discussion about affidavits  
17 saying, "We changed this, we changed that, we  
18 changed our duties under the contract," none are  
19 in writing, and there's no waiver of the Idaho  
20 Tort Claims Act and its requirements in writing.

21 Thank you, Judge.

22 THE COURT: Thank you. Hang on just a  
23 second.

24 I have a question, Mr. Walker. The  
25 March 16, 2009 demand --

1 and all of the communications from and after  
2 March 16, 2009 were sent through Mr. Trout.

3 With regard to the wrongful act as  
4 defined in the statute, our position, and we've  
5 briefed this, Your Honor, is that the city  
6 breached the construction management agreement  
7 when it denied change order number 2, in which it  
8 didn't deny part of it. It just says, "We're not  
9 going to pay you, irrespective of the additional  
10 services that you have rendered."

11 Thank you, Your Honor.

12 THE COURT: Thank you.

13 MR. WALKER: Do you want to hear on these  
14 other two motions in limine that Petra has filed?

15 THE COURT: Hang on just a second.  
16 Mr. Trout?

17 MR. TROUT: Well, one last point.

18 THE COURT: And I'm going to give you the  
19 final word, because I think it's fair enough,  
20 Mr. Trout, that it's your motion, and I think it's  
21 only fair that the person who brings the motion  
22 gets the final word.

23 I asked Mr. Walker to address something  
24 that I thought was appropriate to address, so I  
25 want to give you the final word. If you have

1 MR. WALKER: Yes, Your Honor.

2 THE COURT: -- that you made. To whom was  
3 that directed precisely?

4 MR. WALKER: William Nary, the city  
5 attorney. At the time I knew that the city was  
6 represented by the city attorney. And under the  
7 professional code of professional responsibility,  
8 I sent a letter to the city attorney, and we've  
9 cited that in our brief, Your Honor.

10 THE COURT: Thank you.

11 Here is my ruling on this motion to  
12 dismiss the Petra counterclaims against the City  
13 of Meridian, based on the contention that the  
14 claimant Petra failed to comply with the notice  
15 requirement of the Idaho Tort Claim Act.

16 I'm going to deny the motion based on  
17 this analysis. The cause of action didn't accrue  
18 fully until February 24, 2009 when the claim was  
19 denied. That is when Petra was reasonably put on  
20 notice that it had a claim.

21 Although the act specifies that notice  
22 under the Tort Claim Act has to be given to the  
23 secretary or the clerk of the agency involved in  
24 this case, the entity, the city, was represented  
25 by counsel, and notice was given to the city

<p style="text-align: right;">38</p> <p>1 through their attorney of record on March 16, 2 2009.</p> <p>3 I find that the provisions of the 4 Tort Claim Act do cover all of the counterclaims, 5 including the contract claims. Notice was 6 complied with on March 16, 2009. Therefore, the 7 motion to dismiss on the grounds stated is denied.</p> <p>8 And at this point, I'm ready to hear 9 the arguments on the two motions in limine, two 10 motions filed by each side.</p> <p>11 MR. WALKER: I don't think the city has 12 filed any motions in limine.</p> <p>13 MR. TROUT: Yes, we did.</p> <p>14 THE COURT: Yeah. The city --</p> <p>15 MR. WALKER: We didn't get them if they were 16 filed.</p> <p>17 THE COURT: The Lemley affidavit, right?</p> <p>18 MR. WALKER: I thought those were motions to 19 strike that the court has already ruled on.</p> <p>20 MR. TROUT: No. They were motions in limine 21 with respect to --</p> <p>22 THE COURT: I'm going to hear those as well. 23 Particularly the Bennett, Coughlin, and Frank 24 affidavits were submitted in connection with the 25 motion for summary judgment that I ruled upon.</p>	<p style="text-align: right;">39</p> <p>1 Right?</p> <p>2 MR. WALKER: Correct, Your Honor.</p> <p>3 THE COURT: And since then -- and they were 4 relied on for their -- they were admitted by the 5 court and relied upon by the court based on the 6 fact that they were admissible lay opinions as 7 opposed to expert opinions.</p> <p>8 Since that time, it appears to the 9 court that the Defendant/Counterclaim Petra has 10 identified those witnesses as experts and that you 11 did that for trial and that you did that timely.</p> <p>12 My understanding of the second motion 13 in limine filed by Meridian now is that the city 14 seeks to exclude those three affidavits and one 15 other affidavit based on the -- well, based on 16 the -- well, based on an additional argument.</p> <p>17 So I do think that that's properly 18 before the court today, and I'm going to give 19 Mr. Trout an opportunity to argue in favor of his 20 motion in limine with respect to those three 21 witnesses, plus that fourth witness, plus Lemley's 22 affidavit. Okay?</p> <p>23 MR. WALKER: That's fine, Your Honor.</p> <p>24 THE COURT: But in the meantime, I'll hear 25 your argument on your two motions in limine.</p>
<p style="text-align: right;">40</p> <p>1 MR. WALKER: Okay, Your Honor. Thank you. 2 I'll go ahead and start with the motion in limine 3 to exclude evidence of the city's damages.</p> <p>4 As the court knows from our prior 5 argument to date, the city filed its complaint on 6 April 16, 2009. And in its complaint, it seeks 7 damages for Petra's breach of contract.</p> <p>8 Now we're just 65 days before trial, 17 9 months after the complaint was filed, and Meridian 10 has not disclosed the critical factual information 11 regarding its damages that Petra needs to defend 12 against those claims.</p> <p>13 And this is despite Petra's expansive 14 discovery efforts, which included taking the 15 depositions of Mayor Tammy de Weerd, the counsel 16 president Charlie Roundtree, the city council 17 liaison Keith Bird, Keith Watts, the city's 18 authorized representative under the construction 19 management agreement and the city's purchasing 20 agent. Your Honor, we also deposed three of the 21 city's experts: Steven Amento, Laura Knothe, and 22 Todd Weltner.</p> <p>23 Now, importantly, the city has not 24 disclosed any experts who may testify regarding 25 damages, and none of the deponents that we took</p>	<p style="text-align: right;">41</p> <p>1 depositions of identify the city's damages 2 theories or amounts.</p> <p>3 And as the court knows, in order to 4 defend against any damage claim, the defendant and 5 in this case Petra needs to know first each 6 element of alleged damage; second, the amount of 7 the alleged damage arising with respect to each 8 such element; third, the method of calculating the 9 amount of the alleged damage with respect to each 10 element; fourth, the assumptions underlying the 11 calculation of the amount of the alleged damage 12 arising with respect to each element; and fifth 13 and importantly, the cause or the cause of the 14 alleged damage.</p> <p>15 Now, the city's opposition brief 16 states, and I quote: "Petra simply cannot in 17 good-faith assert that it did not receive the 18 disclosure of Meridian's evidence of damages." 19 However, consistent with the strategy so far 20 during discovery, the city's responsive brief 21 doesn't cite a single reference to the record 22 where either the court or Petra can find the 23 theories, the amounts, how the amounts of damage 24 were calculated.</p> <p>25 And the reason for that, Your Honor, is</p>

1 that there is no evidence in the record.

2 THE COURT: Well, precisely what were their  
3 responses to those questions when you made  
4 requests for admission or -- well, I suppose when  
5 you made your interrogatory, when you asked your  
6 question by way of interrogatory and you at some  
7 point said, "How much do you claim we owe you and  
8 how did you calculate that, and what's your theory  
9 here?"

10 And your contention is that there was  
11 never a response that would allow you to know  
12 enough about their claims, their claim or claims,  
13 that you could give to your expert to be ready to  
14 refute that.

15 MR. WALKER: Let me give you the answers.

16 We asked them to identify their damage  
17 claim. The city responded in their response to  
18 our interrogatory: "At present the findings to  
19 date indicate that Petra's conduct, both its  
20 actions and its failures to act are the cause of  
21 substantial but yet to be quantified damages to  
22 the City of Meridian under the legal theories  
23 expressed in the complaint."

24 We asked another interrogatory  
25 regarding legal and factual bases for the city's

1 your reasonable discovery request by ever saying  
2 how much they wanted and specifically factually  
3 that was based on, that they should be precluded  
4 now from putting on any evidence that would  
5 support any specific claim for damages.

6 And without a specific claim for  
7 damages, there's no way that you could be prepared  
8 to meet that?

9 MR. WALKER: That's correct, Your Honor,  
10 because we would have to have expert testimony.  
11 The deadline for our disclosure of experts has  
12 past. And in any event, we're just literally 60  
13 days before trial, and we don't know what we did  
14 wrong or if we did anything wrong; what damage did  
15 it cause and in what amount and how did they  
16 calculate it. We don't have the answers to any of  
17 those questions.

18 Briefly then, Your Honor, I'll move on  
19 to the experts, and this is again a question of  
20 nondisclosure on the part of the City of Meridian.

21 As the court knows, its scheduling  
22 order required the city to disclose its experts on  
23 or before July 28, 2010. It says the disclosure  
24 be made in compliance with Rule 26(b)(4), and the  
25 court is aware of the standards under 26 (b)(4).

1 claims. And the city's response was: "The body  
2 of law comprising contract law as applicable to  
3 the facts and the law of torts, applicable to the  
4 facts supports the claims and defenses made by  
5 Meridian in this matter. The body of law  
6 comprising equitable principles supports the  
7 claims of defenses of Meridian in this matter."

8 THE COURT: So in short you're saying, you  
9 were asking how much, and they were saying we  
10 don't know yet.

11 MR. WALKER: And each and every one of their  
12 witnesses did not know. And specifically, the  
13 three experts said that they had never been  
14 asked -- excuse me, the two experts, Amento and  
15 Knothe, said they had never been asked to make a  
16 damages calculation.

17 THE COURT: Now, this motion which you're  
18 couching in terms of a motion in limine is the  
19 whole ball game as far as their claim is  
20 concerned. You would agree with that, wouldn't  
21 you?

22 MR. WALKER: Yes. On damages, correct.

23 THE COURT: In other words, if this court  
24 grants your motion in limine and based upon your  
25 contention that Meridian failed to comply with

1 THE COURT: Now, you concede that out of the  
2 12 experts, three of them complied.

3 MR. WALKER: Essentially. Not completely  
4 but essentially.

5 THE COURT: But there's nine others that you  
6 want me to say --

7 MR. WALKER: They're out. And because we  
8 don't -- we didn't have any information except on  
9 July 28 we received by fax a list of 12 names.  
10 And recently they supplemented their discovery  
11 responses. However, the supplements did not meet  
12 the requirements of either Rule 26(b)(4) or  
13 respond to our interrogatory with regard to expert  
14 witness disclosures.

15 And specifically I've cited in our  
16 briefing our interrogatory dealing with the  
17 request of disclosure as to expert witnesses, and  
18 it's very precise. It asks for some additional  
19 information in addition to 26(b)(4). And as we've  
20 cited in our briefing, the Idaho Supreme Court in  
21 Schmechel versus Dille has held that Rule 26(e)  
22 unambiguously imposes a continuing duty to  
23 supplement responses to discovery with respect to  
24 the substance and subject matter of the expert's  
25 testimony where initial responses have been



1 rejected, modified, expanded, or otherwise altered  
2 in some state.

3 And at this late date, Your Honor, it's  
4 simply unreasonable to assume that we can properly  
5 prepare, number one, to take the deposition of  
6 these nine experts and certainly to prepare cross  
7 examination for trial.

8 Thank you, Your Honor.

9 THE COURT: Thank you, counsel.

10 And I'll hear your opposition argument  
11 to the two motions in limine filed by Petra,  
12 Mr. Trout.

13 MR. TROUT: Thank you, Judge.

14 This is nothing more than a disguised  
15 effort on Petra to fail to comply with the Idaho  
16 Idaho Rules of Civil Procedure. Judge, you're  
17 aware that any requests under Rule 37(a) has to be  
18 met with a certification by counsel to meet and  
19 confer.

20 There's no affidavit. There's no  
21 document. There's no letter. There's no effort  
22 with respect to meet and confer as required under  
23 37(a)(2): "The motion must include a  
24 certification that the movant has in good-faith  
25 conferred or attempted to confer with a party not

1 Petra is not prepared to depose these people is  
2 unequivocally wrong. If I might approach?

3 This is a deposition schedule, which  
4 I'm handing to the court, copy to counsel, in  
5 which every single one of these people have been  
6 discussed, and we have agreed to dates for  
7 deposition for every single one of these  
8 individuals, including Mr. Geiss, Mr. Cotton,  
9 Mr. Neidigh, Mr. Wetherholt, Mr. Anderson. A  
10 continued deposition of Laura Knothe who has been  
11 deposed once but whose deposition wasn't  
12 completed. Mike Simmonds, Tim Petsche,  
13 Todd Weltner, which is a continuation of his  
14 deposition which was taken once but not completed.  
15 Steve Amento whose deposition has been taken but  
16 not yet completed. Ted Baird whose deposition has  
17 been taken but not yet completed.

18 And so every one of the people that  
19 we've identified is currently subject to a  
20 discovery date and deposition agreed to between  
21 counsel with respect to the information that they  
22 have in this matter.

23 THE COURT: How many days before trial are  
24 we today?

25 MR. TROUT: Judge, I haven't done the

1 making the disclosure in an effort to secure the  
2 disclosure without court action."

3 Petra wants to bypass the meet and  
4 confer requirement entirely and ask the court to  
5 enter an order without having complied with  
6 37(a)(2), and on that basis alone, Judge, you are  
7 free and in fact should deny the motion.

8 Secondly, if I might, if I might  
9 approach, Judge.

10 THE COURT: All right.

11 MR. TROUT: I'm handing you what is a copy  
12 of the May 6 Petra Incorporated first request for  
13 discovery. And I'm going to ask the court to  
14 direct its attention to the instructions submitted  
15 by Petra with respect to that request, and that  
16 is, "Including supplementing answers and responses  
17 from time to time but not later than 30 days after  
18 receipt of the additional information or documents  
19 and in no event later than 45 days before trial."

20 Petra's motion today is premature, and  
21 I'll represent to the court that each of the  
22 parties that we have listed, including the  
23 affidavits, were all supplemented within 30 days  
24 of our obtaining the information.

25 And finally I'll conclude. To say that

1 calculation.

2 THE COURT: December 1. 65? Okay.

3 MR. WALKER: 65.

4 MR. TROUT: Correct. So according to the  
5 request made by Petra, the requests made in this  
6 motion is, A, premature; and B, barred by failure  
7 to provide a certification to the court as  
8 required under Rule 37.

9 One last item, Judge. I won't stand  
10 here and tell you that I have every single  
11 citation to every piece of the transcript. But in  
12 the depositions of Mr. Baird, Mr. Watts,  
13 Mr. Amento, Ms. Knothe, and Mr. Weltner, and the  
14 affidavits that were submitted in opposition to  
15 Petra's motion for summary judgment, all of the  
16 foundational bases for the city's claim of damages  
17 have been stated.

18 THE COURT: Let me ask you this question,  
19 and this is something that I intended to ask when  
20 we got to this point in the arguments today.

21 If I were to ask you today, Mr. Trout,  
22 if you could tell the court today -- and I'm not  
23 asking if you can say what the city would settle  
24 for or something like that. But do you have a  
25 precise figure on how much money you claim that

1 the city is entitled to?

2 MR. TROUT: I have one precise figure, and I  
3 have some estimates. The one precise figure is  
4 with respect to Petra's failure to collect  
5 liquidated damages, and it approximates  
6 \$1.2 million.

7 And there are additional damages being  
8 calculated as we sit here in order to comply with  
9 the discovery request and the deadlines set. I  
10 will tell you that we have had continuing  
11 discussions about the 30(b)(6) deponent that Petra  
12 has requested of us for a damages calculation, and  
13 we're going to name at least two individuals as  
14 the 30(b)(6) representatives to be deposed.  
15 They're included in this list of deponents.

16 And so that discovery is underway as  
17 well, in compliance with the timeframes set forth  
18 in Petra's discovery response.

19 THE COURT: All right. I guess that's all.

20 MR. TROUT: Thank you, sir.

21 THE COURT: Go ahead, counsel.

22 MR. WALKER: Thank you, Your Honor. With  
23 regard to the no effort to meet and confer, I  
24 filed an affidavit in opposition to the motion to  
25 dismiss under the Tort Claims Act. It's dated

1 other nine experts.

2 But right now we have to go into those  
3 depositions essentially blind. We're not sure  
4 what they're going to testify about. However, if  
5 they had responded to our interrogatory number 16  
6 and had complied with Rule 26(b)(4), we would be  
7 able to prepare to take those depositions.

8 Mr. Trout also mentioned that on this  
9 list, that there are damages experts. I don't see  
10 them, Your Honor, but I certainly would be  
11 interested to know who they are. Thank you.

12 THE COURT: All right. Let me tell you what  
13 I'm going to do on these two motions in limine  
14 filed by Petra.

15 The first request for discovery that  
16 was served by Petra on Meridian on or about I  
17 believe May 7, 2009, actually dated May 6, 2009,  
18 requests these answers in any event no later than  
19 45 days before trial.

20 I'm not going to grant the motion to  
21 exclude testimony by the nine experts until and  
22 unless 45 days before trial the expert opinions  
23 are not received. It could be that perhaps the  
24 26(b)(4) disclosures for one or two of the  
25 witnesses will be served in response to this

1 September 15. And Exhibit O to that affidavit is  
2 a letter that I wrote to Mr. Trout, a detailed  
3 letter pointing out the deficient answers. It is  
4 dated June 12, 2009, more than a year ago.

5 The response I received to that was on  
6 June 16, 2009 from Mr. Trout's assistant,  
7 Kevin Kluckhorn. And Kevin writes: "Tom, Kim  
8 forwarded your June 12, 2009 letter to me  
9 regarding the discovery responses. We are  
10 currently preparing for a trial set to begin on  
11 Monday, June 22, 2009, and lasts five to ten days.

12 "We will be unavailable to meet and  
13 confer by that deadline you requested, and we will  
14 respond just as soon as you're able to meet after  
15 that trial."

16 Never heard another word from them.  
17 But as we argue in our brief, our motion in limine  
18 is not a motion to compel.

19 THE COURT: Right, and I understand that.

20 MR. WALKER: And with regard to the depo  
21 notices, the court's scheduling order says that  
22 all depositions shall be noticed up before  
23 September 29. So out of -- as a protective  
24 measure, we went ahead and obtained available  
25 dates so we could take the depositions of these

1 discovery request 45 days before trial, and others  
2 won't be disclosed by then.

3 To the extent that any of these named  
4 experts fail to have their opinions and the basis  
5 of their opinions, and so forth, by 45 days before  
6 trial, they'll be excluded. But I'm going to give  
7 Meridian until 45 days before trial to comply with  
8 the discovery request, which does contain the  
9 demand to have these opinions disclosed in any  
10 event no later than 45 days before trial.

11 There is no requirement on a motion in  
12 limine to exclude evidence to show that one of the  
13 parties brought a motion to compel anyway. And in  
14 any event, this isn't a motion to compel. And the  
15 meet and confer provision of Rule 37 of the Idaho  
16 Rules of Civil Procedure does not apply otherwise  
17 in motions to compel.

18 On the other hand, I will order the  
19 parties to meet and confer about two issues. One,  
20 and most importantly, the testimony that has been  
21 sought or rather the answers to interrogatories,  
22 and so forth, that have been aimed at obtaining  
23 information from the City of Meridian to support  
24 their claim for damages, and to do that within  
25 absolutely no later than 30 days before trial, to

1 meet and confer about that.

2 Now, I could order I suppose mediation.  
3 But under the circumstances of the case, I'm not  
4 going to do that right now. I can't remember if  
5 the parties have mediated this or not.

6 MR. TROUT: We did.

7 THE COURT: Okay. Secondly -- and I'm not  
8 going to grant the motion. I'm going to deny the  
9 motion in limine that will preclude the City of  
10 Meridian from putting on any evidence of damages  
11 now, and I think that's pretty obvious from my  
12 ruling on the other motion in limine, because I do  
13 think it's premature.

14 I think by all rights and based on the  
15 express language of the interrogatories, the first  
16 set of interrogatories that the City of Meridian  
17 should have up to 45 days before trial, and we can  
18 revisit the issue if there are named experts who  
19 have not yet complied with their 26(b)(4) opinions  
20 after that date, after 45 days before trial. And  
21 I think that's it on that issue.

22 Now, Mr. -- we have one more thing to  
23 argue today, one more set of motions in limine.  
24 But first I want to make it clear, as I've made my  
25 rulings on two of the three matters that are set

1 THE COURT: And then the three other  
2 fellows.

3 MR. TROUT: I don't know if this will come  
4 up or not, Judge, but hopefully it will. Let me  
5 direct the court's attention first to the issue of  
6 Mr. Bennett and Mr. Coughlin and Mr. Frank.

7 This document that I've placed up on  
8 the screen, for purposes of the record, Judge, is  
9 the memorandum in opposition to plaintiff's motion  
10 to strike the affidavits of Bennett, Coughlin,  
11 Frank, and Lemley that was filed by Petra.

12 The representation made to the court  
13 was, with regard to Bennett, Frank, and Coughlin,  
14 that are not designated as experts and were all  
15 disclosed as fact experts in Petra's discovery  
16 responses August 21, 2009. They have not been  
17 retained as experts.

18 And the fundamental problem we have is,  
19 pursuant to the court's order, as you'll recall  
20 back in June, we asked for the opportunity to  
21 conclude the depositions of Mr. Bennett and  
22 Mr. Coughlin in response to the motion for summary  
23 judgment. We did conclude those depositions based  
24 upon our understanding they were fact witnesses  
25 and they were not expert witnesses.

1 for hearing today, Mr. Walker, I'm going to direct  
2 you to prepare an order consistent with the  
3 court's pronouncements from the bench today with  
4 respect to the motion to dismiss. Petra prevailed  
5 on that issue.

6 And, Mr. Trout, with respect to this --  
7 your opposition to Petra's motions in limine, you  
8 prevailed on both of those motions in limine, so  
9 you prepare an order for the court's signature.  
10 And keep these quite cryptic, folks. I don't  
11 think I need to do findings of fact and  
12 conclusions of law, and I don't want to have a  
13 fight about the -- I think that the important part  
14 of these rulings is the bottom line ruling  
15 themselves, the denial of the motions on both  
16 sides rather than trying to incorporate into the  
17 court's rulings anything that I didn't  
18 specifically mention here on the bench today.

19 The final thing that we have to do  
20 today is address the motions in limine filed by  
21 you, Mr. Trout. You had two things?

22 MR. TROUT: I do.

23 THE COURT: The Lemley affidavit, is that  
24 right?

25 MR. TROUT: Yes, Your Honor.

1 And now on September 15, I believe, of  
2 2010, they have been designated as expert  
3 witnesses, and as such, with those depositions  
4 concluded, we're now precluded from continuing  
5 taking their depositions unless we're allowed  
6 leave of the court to redepose them now with  
7 respect to some expert opinion that is yet to be  
8 disclosed. They've simply been disclosed as  
9 experts.

10 And it's on that basis that we think  
11 we're prejudiced, and we ask the court to exclude  
12 them as expert witnesses in this matter.

13 Now, with respect to Mr. Lemley, and  
14 I'll switch to the next motion because this is the  
15 one -- and I apologize for this little glitch --  
16 the basis for excluding Mr. Lemley as an expert is  
17 that he is not acting as the expert.

18 THE COURT: Right. He consulted with these  
19 other folks, and he is just restating the opinions  
20 that these other individuals have expressed to  
21 him.

22 MR. TROUT: More importantly, he is not  
23 acting as the expert. This is an excerpt from  
24 page 2 of 12 of the Lemley international report,  
25 and I'm going to direct the court's attention to

1 the very last paragraph. It's the one that is the  
2 crux of the supposed opinion, and it doesn't say,  
3 "This is my opinion."

4 This says, In Lemley, LI's, Lemley  
5 International's opinion, Petra exercised the care,  
6 skill, and judgment, et cetera.

7 So our basis for the exclusion of  
8 Mr. Lemley is, A, he is not a licensed  
9 construction manager; B, this isn't his opinion.  
10 It's the opinion of an entity, and under Rule 702,  
11 experts are required to be witnesses. An entity  
12 cannot be a witness, and as such, Judge,  
13 Mr. Lemley is, A, not qualified; B, relying on  
14 others; and C, not stating a personal opinion but  
15 stating an opinion of an entity which cannot be  
16 qualified as an expert witness under Rule 702.

17 THE COURT: Thank you.

18 And, Mr. Trout, I just want to make it  
19 clear for the record, a moment ago when I made a  
20 statement regarding my understanding of the  
21 reasons underlying your motion to exclude  
22 Jack Lemley as an expert, that was the court not  
23 offering an opinion or making a finding of fact,  
24 it was just me saying this to let you know that  
25 this is how far that -- what I anticipate that

1 primarily they're rebuttal experts.

2 And with regard to the content of their  
3 opinions, those are fully set forth in the  
4 disclosure that conforms to the requirements of  
5 Rule 24(b)(6) -- or excuse me, 26(b)(4).

6 And so we think that for purposes of  
7 trial, these gentlemen who have extensive decades  
8 long experience in the construction industry can  
9 give an opinion with respect to whether or not  
10 Petra conformed its work to the standard of care.

11 Thank you, Your Honor.

12 THE COURT: Thank you.

13 MR. TROUT: Nothing further, Judge.

14 THE COURT: All right. I'm going to deny  
15 both of these motions for this reason.

16 I believe that the Lemley affidavit and  
17 opinion is purported to be the opinion of  
18 Jack Lemley, who is a named expert in the case and  
19 he was disclosed timely.

20 And although it wasn't argued, this  
21 wasn't the precise basis of the argument at oral  
22 argument today, my understanding was that when we  
23 had our last hearing last week, well, today I  
24 anticipated that the argument would focus on the  
25 basis for Jack Lemley's affidavit which was the --

1 you're going to argue. So I just wanted to say  
2 that for the record.

3 MR. WALKER: Understood, Judge. Thank you.

4 THE COURT: Thank you.

5 Mr. Walker, I'll hear your opposition  
6 to Mr. Trout's motions in limine.

7 MR. WALKER: Thank you, Your Honor. Well,  
8 curiously Mr. Trout put up the report that was  
9 prepared by Mr. Lemley and Mr. Bauer to disclose  
10 experts as well as the staff at Lemley  
11 International. What he didn't put up was  
12 Jack Lemley's affidavit which clearly states that  
13 it's his opinion to a reasonable degree of  
14 professional certainty that Petra's work complied  
15 with the applicable standard of care and that the  
16 court has that affidavit that has been in the  
17 record since way last spring.

18 So that Mr. Lemley, irrespective of  
19 what the report says, did find or did reach an  
20 independent judgment that Petra's work conformed  
21 to the applicable standard of care as well as the  
22 other things that he states in his affidavit.

23 With regard to Bennett, Coughlin, and  
24 Frank, the court knows and has already said, we  
25 didn't disclose them until December 15. And

1 which were the interviews that he conducted, he  
2 and another gentleman conducted with other  
3 individuals who were familiar with the facts and  
4 circumstances of the case, and that those were the  
5 types of sources of information that experts in  
6 this field rely upon to form expert opinions.

7 So I'm going to deny the motion with  
8 respect to Jack Lemley as an expert, and I'm going  
9 to deny the motion with respect to the other three  
10 individuals, Coughlin --

11 MR. TROUT: If I might assist, Judge,  
12 Bennett and Frank.

13 THE COURT: Thank you, Coughlin, Bennett,  
14 and Frank. These individuals were disclosed as  
15 lay witnesses, fact witnesses, as opposed to  
16 expert witnesses, until the day before the  
17 expiration of the deadline for disclosure of  
18 expert witnesses. On the day before the deadline  
19 for disclosure of expert witnesses, they were  
20 designated as expert witnesses.

21 To the extent that this may  
22 prejudice -- the fact that they weren't named as  
23 expert witnesses at the time, as I understand it  
24 that Meridian already took their depositions, I'm  
25 going to grant Meridian the opportunity if they

1 wish to take the depositions of those three  
 2 individuals to clear up any matters involving  
 3 their expertise.  
 4 I wouldn't anticipate those would be  
 5 lengthy -- well, I won't say. I don't know how  
 6 long those could take. But anyway, if Meridian  
 7 believes that there is a need to retake the  
 8 depositions of any or all of those three now  
 9 expert witnesses, they may do so, but in any event  
 10 no later than 45 days before trial.

11 MR. TROUT: Thank you, Judge.

12 THE COURT: And, Mr. Walker, you prepare the  
 13 order with respect to those two motions in limine.

14 MR. WALKER: Yes, Your Honor.

15 THE COURT: Folks, do we have something else  
 16 teed up next week?

17 MR. WALKER: On Monday, Your Honor.

18 THE COURT: Good. It wouldn't be Monday  
 19 without a hearing on one of these matters, so I  
 20 appreciate that. Anything else, folks?

21 MR. WALKER: That's it, sir.

22 THE COURT: Thank you. The court will be in  
 23 recess until 4 p.m.

24 (Proceedings concluded.)

25 --oOo--

# REPORTER'S CERTIFICATE

1  
 2  
 3  
 4  
 5 I, Dianne E. Cromwell, Official Court  
 6 Reporter, County of Ada, State of Idaho, hereby  
 7 certify:

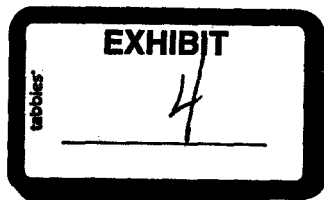
8 That I am the reporter who took the  
 9 proceedings had in the above-entitled action in  
 10 machine shorthand and thereafter the same was  
 11 reduced into typewriting under my direct  
 12 supervision; and

13 That the foregoing transcript contains a  
 14 full, true, and accurate record of the proceedings  
 15 had in the above and foregoing cause, which was  
 16 heard at Boise, Idaho.

17 IN WITNESS WHEREOF, I have hereunto set  
 18 my hand October 4, 2010.

19  
 20  
 21  
 22 \_\_\_\_\_  
 23 Dianne E. Cromwell, Official Court Reporter  
 24 CSR No. 21  
 25

COPY



NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

OCT 20 2010

J. DAVID NAVARRO, Clerk  
By CARLY LATIMORE  
DEPUTY

Thomas G. Walker (ISB 1856)  
Erika Klein (ISB 5509)  
Mackenzie Whatcott (ISB 6774)  
Matthew Schelstrate (ISB 8276)  
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[mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com).

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

AMENDED NOTICE OF TAKING OF  
THE AUDIO-VIDEO DEPOSITION OF  
THE CITY OF MERIDIAN, *DUCE*  
*TECUM*, PURSUANT TO I.R.C.P.  
30(b)(4) AND 30(b)(6) – DAMAGES

TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEYS OF RECORD

YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated  
("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon

oral examination pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure, of Steven J. Amento ("Amento"), the person designated by the City of Meridian ("Meridian" or "City") as the most knowledgeable regarding the damages that the City has allegedly suffered as claimed in paragraph 22 of the City's Complaint filed on April 16, 2009, and as claimed in paragraphs 20, 24, 38, 48, 53, and 55 of the City's proposed First Amended Complaint. According to the City's designation, Amento is the person most knowledgeable regarding: (1) each element of damage, (2) the amount of damage arising with respect to each element, (3) the method of calculating the amount of damage arising with respect to each element, (4) the assumptions underlying the calculation of the amount of damage arising with respect to each element, and (5) the cause or causes of the damage arising with respect to each element. Further, according to the City, Amento is the most knowledgeable person regarding the unjust enrichment claim set forth in paragraph 29 of the City's proposed First Amended Complaint, including (1) each element of unjust enrichment, (2) the amount of unjust enrichment arising with respect to each element, (3) the method of calculating the amount of unjust enrichment arising with respect to each element, (4) the assumptions underlying the calculation of the amount of unjust enrichment arising with respect to each element, and (5) the cause or causes of the unjust enrichment arising with respect to each element. The primary objective of the Rule 30(b)(6) deposition is to inquire of Amento who may testify regarding the foregoing matters at trial.

The deposition will be taken on **Thursday, November 4, 2010** beginning at the hour of **9:00 a.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed.

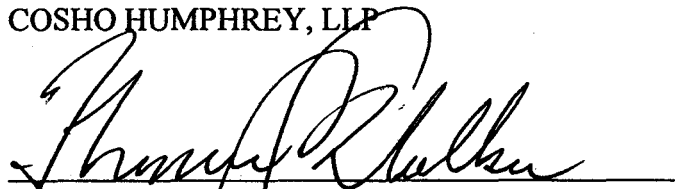
The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires Amento to produce and make available for inspection and copying at the deposition all documents supporting the City of Meridian's claims of damages and unjust enrichment.

This deposition will be taken pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter. The attorney taking the deposition or an employee of Cosho Humphrey, LLP may operate the audio-video equipment.

DATED: October 20, 2010.

COSHO HUMPHREY, LLP



THOMAS G. WALKER  
Attorneys for Petra Incorporated

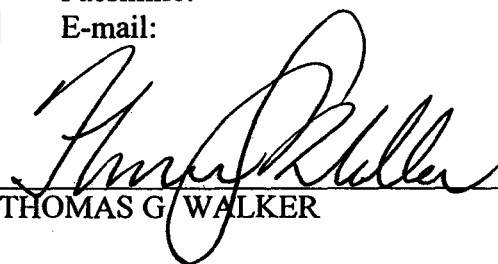


### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 20<sup>th</sup> day of October, 2010, a true and correct copy of the within and foregoing Notice of Taking Audio Video Deposition, *Duces Tecum*, was served upon:

Kim J. Trout, Esq.  
Daniel L. Glynn, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☐ Overnight Courier
- ☒ Facsimile:
- ☐ E-mail:

  
THOMAS G. WALKER

COPY

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

OCT 21 2010

J. DAVID NAVARRO, Clerk  
By A. GARDEN  
DEPUTY

Thomas G. Walker (ISB 1856)  
Erika Klein (ISB 5509)  
Mackenzie Whatcott (ISB 6774)  
Matthew Schelstrate (ISB 8276)  
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[mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com).

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff/Counterdefendant,

vs.

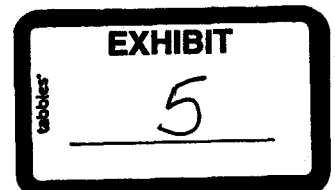
PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

SECOND AMENDED NOTICE OF  
TAKING OF THE AUDIO-VIDEO  
DEPOSITION OF THE CITY OF  
MERIDIAN, *DUCES TECUM*,  
PURSUANT TO I.R.C.P. 30(b)(4) AND  
30(b)(6) – CLAIMS OTHER THAN  
DAMAGES

TO: PLAINTIFF/COUNTER-DEFENDANT, CITY OF MERIDIAN, BY AND  
THROUGH ITS ATTORNEYS OF RECORD



SECOND AMENDED NOTICE OF TAKING OF THE AUDIO-VIDEO DEPOSITION OF THE CITY OF  
MERIDIAN, *DUCES TECUM*, PURSUANT TO I.R.C.P. 30(b)(4) AND 30(b)(6) – CLAIMS OTHER THAN  
DAMAGES

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YOU ARE HEREBY NOTIFIED that Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its counsel of record, Thomas G. Walker, will take the testimony, upon oral examination pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure, of Theodore W. Baird, Jr. ("Baird"), the person designated by the City of Meridian ("Meridian" or "City") as the most knowledgeable regarding the allegations by the City set forth in paragraphs 4 through 21 of the City's Complaint filed on April 16, 2009, and as claimed in paragraphs 4 through 19, 23, 26 through 28, 31 through 37, 40 through 47, 50 through 52, and 55 of the City's proposed First Amended Complaint. According to the City's designation, Baird is the person most knowledgeable regarding: (1) the facts the City claims support Petra's alleged breach of contract, (2) the facts the City claims support Petra's alleged breach of the covenant of good faith and fair dealing, (3) the facts the City claims support Petra's alleged unjust enrichment, (4) the facts the City claims support Petra's alleged fraud and fraud in the inducement, (5) the facts the City claims support Petra's alleged constructive fraud, (6) the facts the City claims support Petra's alleged gross negligence, and (7) the facts the City claims support Petra's alleged oppressive, malicious, fraudulent or outrageous conduct.

The primary objective of the Rule 30(b)(6) deposition is to inquire of Baird who may testify regarding the foregoing matters at trial.

The deposition will be taken on **Wednesday, November 3, 2010**, beginning at the hour of **12:00 p.m.**, at the offices of Cosho Humphrey, LLP, 800 Park Blvd., Suite 790, Boise, Idaho 83701, and continuing thereafter until completed.

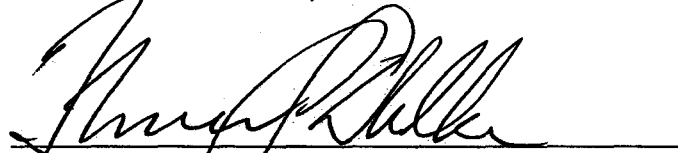
The deposition will be before a Notary Public and Court Reporter for the State of Idaho who will simultaneously make a stenographic record and which will be recorded by audio-video means, at which time and place you are notified to appear and take such part in said examination as shall be deemed just and proper.

YOU ARE FURTHER NOTIFIED that, to the extent not previously produced, Petra requires Baird to produce and make available for inspection and copying at the deposition all documents supporting the City of Meridian's claims described above.

This deposition will be taken pursuant to Rules 30(b)(4) and 30(b)(6) of the Idaho Rules of Civil Procedure for use in pre-trial litigation and at the trial of this matter. The attorney taking the deposition or an employee of Cosho Humphrey, LLP may operate the audio-video equipment.

DATED: October 21, 2010.

COSHO HUMPHREY, LLP

A handwritten signature in black ink, appearing to read 'Thomas G. Walker', is written over a horizontal line.

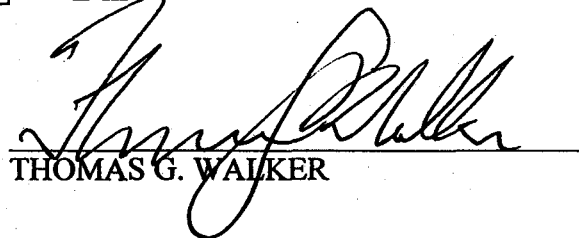
THOMAS G. WALKER  
Attorneys for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 21st day of October, 2010, a true and correct copy of the within and foregoing Notice of Taking Audio Video Deposition, *Duces Tecum*, was served upon:

Kim J. Trout, Esq.  
Daniel L. Glynn, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☐ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☒ Facsimile:  
☐ E-mail

  
THOMAS G. WALKER

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho )  
Municipal Corporation, )  
 ) Case No. CV OC 0907257  
 )  
Plaintiff/Counterdefendant, )  
 )  
vs. )  
 )  
PETRA INCORPORATED, an Idaho )  
corporation, )  
 )  
Defendant/Counterclaimant. )  
\_\_\_\_\_ )

AUDIO-VIDEO 30(b)(6) DEPOSITION OF STEVEN J. AMENTO

November 4, 2010

Boise, Idaho

Janet French, CSR #946, RPR

Associated Reporting Inc.  
208.343.4004

EXHIBIT

tabbles

6

Page 2

## AUDIO-VIDEO 30(b)(6) DEPOSITION OF STEVEN J. AMENTO

BE IT REMEMBERED that the deposition of STEVEN J. AMENTO was taken by the Defendant/Counterclaimant at the offices of Cosho Humphrey, LLP, located at 800 Park Boulevard, Suite 790, Boise, Idaho, before Associated Reporting, Inc., by Janet French, a Court Reporter and Notary Public in and for the County of Ada, State of Idaho, on Thursday, the 3rd day of November, 2010, commencing at the hour of 9:56 a.m. in the above-entitled matter.

## APPEARANCES:

For the Plaintiff/ TROUT JONES GLEDHILL FUHRMAN, P.A.

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ktrout@idalaw.com

For the Defendant/ COSHO HUMPHREY, LLP

Counterclaimant: By: Thomas G. Walker, Esq.

800 Park Blvd., Suite 790

Post Office Box 9518

Boise, Idaho 83707-9518

Telephone: (208) 344-7811

Facsimile: (208) 338-3290

twalker@cosholaw.com

Also present: Tom Coughlin

Page 4

## PROCEEDINGS

09:55:34 1  
09:55:34 2  
09:56:03 3 MR. WALKER: We are on the record.  
09:56:07 4 This is the 30(b)(6) deposition of the City  
09:56:13 5 of Meridian, the City having designated Steven J.  
09:56:17 6 Amento as the person most knowledgeable with respect  
09:56:19 7 to its damages claims.  
09:56:22 8 This deposition is being taken on behalf of  
09:56:25 9 the defendant, Petra Incorporated, in Case No. CV OC  
09:56:29 10 09-7257, filed by the City of Meridian in the District  
09:56:31 11 Court of the Fourth Judicial District for the State of  
09:56:34 12 Idaho in and for Ada County.  
09:56:36 13 This deposition is being taken on November  
09:56:41 14 4th, 2010, commencing at approximately 9:55 a.m.,  
09:56:46 15 before Janet French of Associated Reporting, Inc.  
09:56:48 16 The deposition is being taken at the offices  
09:56:53 17 of Cosho Humphrey, LLP, at 800 Park Boulevard, Suite  
09:56:56 18 790, Boise, Idaho 83712.  
09:56:59 19 I'm Thomas G. Walker of the Cosho Humphrey  
09:57:03 20 firm, and I'm here representing Petra Incorporated,  
09:57:06 21 the defendant in this lawsuit. I'm also the operator  
09:57:08 22 of the audio/visual equipment.  
09:57:10 23 This deposition is being taken in accordance  
09:57:16 24 with the Idaho Rules of Civil Procedure, and there are  
09:57:16 25 no other stipulations that I'm aware of.

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09:57:16 1 Do you agree, Mr. Trout?  
09:57:18 2 MR. TROUT: There are no stipulations.  
09:57:21 3 MR. WALKER: Kim J. Trout is here representing  
09:57:26 4 the City of Meridian. Steven J. Amento, the deponent,  
09:57:30 5 is present, as well as Tom Coughlin, a consultant to  
09:57:31 6 our firm.  
09:57:31 7 Would you please swear the witness, Janet.  
09:57:31 8  
09:57:31 9 STEVEN J. AMENTO,  
09:57:31 10 a witness having been first duly sworn to tell the  
09:57:31 11 truth, the whole truth, and nothing but the truth,  
09:57:31 12 testified as follows:  
09:57:31 13  
09:57:31 14 (Deposition Exhibit Nos. 325 & 328 marked.)  
09:57:31 15  
09:57:31 16 EXAMINATION  
09:57:31 17 BY MR. WALKER:  
09:57:46 18 Q. Thank you, Mr. Amento. I'm going to hand  
09:57:58 19 you what we have marked as Exhibit No. 325 -- oh. Let  
09:57:59 20 me -- I'm sorry. You can keep 325. I'm also going to  
09:58:03 21 give you 328, which is your notice of the 30(b)(6)  
09:58:04 22 deposition for today.  
09:58:05 23 Have you seen that document before?  
09:58:06 24 A. Yes.  
09:58:10 25 Q. Did you bring any documents in response to

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09:58:13 1 the duces tecum notice contained in the document?

09:58:14 2 A. Yes.

09:58:19 3 Q. Okay. And could I see those documents,

09:58:39 4 please?

09:58:42 5 Thank you.

09:58:44 6 MR. WALKER: Let's go off the record for a couple

09:58:45 7 of minutes.

10:01:46 8 (Off the record.)

10:01:50 9 MR. WALKER: Back on the record. Thank you,

10:01:54 10 Mr. Amento, for providing us with these documents.

10:01:56 11 We are going to want to have the court

10:01:59 12 reporter copy those after the deposition is concluded

10:02:02 13 and mark them as an exhibit.

10:02:06 14 Is that satisfactory?

10:02:07 15 THE WITNESS: Sure.

10:02:07 16 MR. WALKER: Thank you.

10:02:07 17 (Deposition Exhibit Nos. 229 & 230 marked.)

10:02:14 18 Q. (BY MR. WALKER) Now, if you'd take a look

10:02:18 19 at Exhibit No. 325, please.

10:02:22 20 Did you prepare Exhibit No. 325?

10:02:22 21 A. No.

10:02:25 22 Q. Do you know who did?

10:02:30 23 A. I believe it was prepared by Mr. Trout's

10:02:30 24 office.

10:02:34 25 Q. Okay. And do you know who in Mr. Trout's

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10:02:38 1 office prepared Exhibit No. 325?

10:02:42 2 A. I'm not sure.

10:02:53 3 Q. Okay. Do you know when Exhibit No. 325 was

10:02:54 4 prepared?

10:03:17 5 A. There is no date on this exhibit. I have a

10:03:24 6 similar version of this document, which I believe I

10:03:28 7 received, oh, approximately two or three weeks ago.

10:03:32 8 Q. Okay. Do you have a receive date so we can

10:03:34 9 fix the date when you received it?

10:03:36 10 A. No. There is not a received date on it.

10:03:41 11 Q. Okay. Turning to the second page of Exhibit

10:03:49 12 No. 325, which is CM114378 also referred to as Tab 1.

10:03:50 13 Do you see that?

10:03:50 14 A. Yes.

10:03:55 15 Q. Okay. And can you explain to me what the

10:03:58 16 information on Tab 1 is.

10:04:03 17 A. The information on Tab 1 is a summary of the

10:04:06 18 various damage calculations that follow on the

10:04:07 19 subsequent tabs.

10:04:12 20 Q. Okay. And did you have an opportunity to

10:04:18 21 verify that the entries on Tab 1 correctly summarize

10:04:23 22 and accumulate the totals of the damages?

10:04:23 23 A. Yes.

10:04:27 24 Q. If you turn to page -- the next page,

10:04:32 25 CM114379, which is also marked "Tab 2."

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10:04:40 1 And item 1 is -- indicates "Liquidated

10:04:43 2 Damages" as the issue, and if it is performed by you,

10:04:49 3 an estimated cost of \$1,650,000.

10:04:52 4 How was this claim developed by you?

10:04:56 5 A. The basis of the claim is provided in an

10:04:59 6 affidavit, which we discussed at my last deposition.

10:05:02 7 Q. Okay. And I recall from that affidavit that

10:05:09 8 you calculated the -- that you used August 1 of 2008

10:05:16 9 as a date for calculating 75 days to October 15, 2008.

10:05:18 10 Do you recall that?

10:05:21 11 A. I'd have to look back at the table that I

10:05:24 12 used to calculate it, but, yes, those -- I recall

10:05:27 13 those were critical dates to that table.

10:05:30 14 Q. Why did you select August 1, 2008, as the

10:05:34 15 date from which to start calculating liquidated

10:05:35 16 damages?

10:05:38 17 A. Well, I think what I'd like to do is refer

10:05:42 18 back to the affidavit before we discuss it.

10:05:43 19 Is that possible?

10:05:46 20 Q. Sure. Let's go off the record, and we'll

10:05:48 21 find it among the exhibits there.

10:05:49 22 MR. WALKER: Off the record.

10:08:46 23 (Off the record.)

10:09:23 24 MR. WALKER: Okay. We are back on the record.

10:09:25 25 Q. (BY MR. WALKER) And, Mr. Amento, you've had

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10:09:28 1 an opportunity to review your affidavit dated

10:09:32 2 September 20, 2010, which is Deposition Exhibit

10:09:34 3 No. 292; is that correct?

10:09:36 4 A. Yes, that is correct.

10:09:39 5 Q. And we were discussing the start date of

10:09:45 6 August 1, 2008, for purposes of your calculation of

10:09:48 7 liquidated damages; is that correct?

10:09:48 8 A. That's correct.

10:09:52 9 Q. And my question is: Why did you select

10:09:57 10 August 1, 2008, as the date to start counting?

10:09:59 11 A. Because that was the original planned

10:10:02 12 occupancy date for the project.

10:10:04 13 Q. And where did you find that?

10:10:06 14 A. That was in the Construction Management Plan

10:10:09 15 prepared by Petra.

10:10:13 16 Q. Okay. If you look at Exhibit No. 2, which

10:10:17 17 there is another volume over there, which is the

10:10:19 18 Construction Management Plan.

10:10:26 19 MR. TROUT: That's incorrect. Exhibit No. 2 is

10:10:28 20 the Construction Management Agreement.

10:10:31 21 MR. WALKER: Correct. I'm sorry.

10:10:32 22 Q. (BY MR. WALKER) Were you referring to the

10:10:35 23 Construction Management Agreement or the Construction

10:10:37 24 Management Plan?

10:10:49 25 A. The plan, which is Exhibit No. 5.

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10:10:52 1 Q. And what page are you looking at?

10:11:11 2 A. CMO17065.

10:11:17 3 Q. And where on that page, page 17065, do you

10:11:22 4 find a start date of August 1, 2006?

10:11:24 5 MR. TROUT: Object to the form of the question.

10:11:30 6 THE WITNESS: If you look at ID No. 71,

10:11:34 7 "Occupancy," it shows a start and finish date of

10:11:37 8 August 1, 2008, for occupancy.

10:11:39 9 Q. (BY MR. WALKER) Okay. And, Mr. Amento, did

10:11:42 10 you look at any of the subsequent master production

10:11:45 11 schedules that were provided by Petra to the City?

10:11:47 12 MR. TROUT: Object to the form.

10:11:49 13 THE WITNESS: I've seen subsequent schedules,

10:11:50 14 yes.

10:11:52 15 Q. (BY MR. WALKER) And are you aware,

10:11:57 16 Mr. Amento, that subsequent to filing -- or subsequent

10:11:59 17 to the execution of the Construction Management

10:12:05 18 Agreement, Exhibit No. 2, that contaminated and

10:12:09 19 unsuitable soils were discovered in greater quantities

10:12:12 20 than anticipated on the site?

10:12:13 21 MR. TROUT: Object to the form of the question.

10:12:15 22 THE WITNESS: Yes, I recall there was

10:12:19 23 contaminated soils on the site.

10:12:20 24 Q. (BY MR. WALKER) And did you review any of

10:12:23 25 the documents that related to removal of those

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10:12:27 1 contaminated and unsuitable soils?

10:12:28 2 MR. TROUT: Object to the form.

10:12:29 3 THE WITNESS: Yes, I've seen some of the

10:12:30 4 documents.

10:12:31 5 Q. (BY MR. WALKER) And having reviewed those

10:12:34 6 documents, were you able to conclude what, if any,

10:12:37 7 delay in the production schedule was caused as a

10:12:40 8 consequence of the requirement that contaminated and

10:12:44 9 unsuitable soils be remediated?

10:12:46 10 MR. TROUT: Object to the form to the extent that

10:12:49 11 it misstates evidence in the record, and it calls for

10:12:49 12 a legal conclusion.

10:12:51 13 THE WITNESS: I didn't perform an individual

10:12:54 14 analysis of the delay. I do know that a change order

10:12:58 15 was issued to Petra's contract for -- I believe, 30

10:13:04 16 days for Petra's contract, to extend their contract,

10:13:08 17 but no similar change order was issued to the various

10:13:10 18 trade contractors on the project.

10:13:14 19 Q. (BY MR. WALKER) In your review of the

10:13:18 20 documents in this case, did you have an opportunity to

10:13:20 21 look at the monthly reports that were provided by

10:13:25 22 Petra to the City starting in December of 2007?

10:13:26 23 MR. TROUT: Object to the form.

10:13:28 24 THE WITNESS: I believe I've seen many of the

10:13:29 25 monthly reports.

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10:13:30 1 Q. (BY MR. WALKER) And did you have an

10:13:34 2 opportunity to review the master production schedules

10:13:37 3 that were included within those monthly reports?

10:13:40 4 MR. TROUT: Object to the form of the question.

10:13:42 5 THE WITNESS: I believe I've seen the master

10:13:44 6 production schedules, if that's what you are referring

10:13:49 7 to. There were schedules and those reports.

10:13:51 8 Q. (BY MR. WALKER) Right. I'm going to ask

10:13:54 9 you to look at Deposition Exhibit No. 322.

10:13:54 10 MR. WALKER: Is that in one of the books right in

10:13:54 11 front of the witness, Janet?

10:13:54 12 THE WITNESS: Another volume?

10:14:28 13 Q. (BY MR. WALKER) Mr. Amento, if you would

10:14:34 14 take a look at Exhibit No. 322, the second page, which

10:14:38 15 is marked CM073743.

10:14:39 16 MR. TROUT: I'm going to object to the form of

10:14:42 17 the question and any questions related to Exhibit No.

10:14:47 18 322, because it is a manufactured exhibit, which is

10:14:53 19 incomplete and fails to contain complete information

10:14:57 20 regarding the purported representation regarding the

10:15:03 21 monthly reports issued in theory by Petra to the City

10:15:05 22 of Meridian.

10:15:06 23 MR. WALKER: Let's go off the record, and I'm

10:15:13 24 going to grab the binder with the full reports.

10:15:15 25 THE WITNESS: Please do.

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10:15:16 1 MR. WALKER: Off the record.

10:26:36 2 (Recess taken from 10:15 a.m. to 10:26 a.m.)

10:26:38 3 MR. WALKER: We are back on the record, and we

10:26:43 4 gathered up the monthly reports.

10:26:45 5 Q. (BY MR. WALKER) Mr. Amento, in the large

10:26:47 6 binder in front of you that the court reporter has

10:26:51 7 provided us, would you look at Exhibit No. 135A, and

10:26:55 8 in particular, turn to the master production schedule,

10:27:00 9 which is on CM073743.

10:27:19 10 Mr. Amento, do you know when the

10:27:22 11 construction on the Meridian City Hall building was

10:27:24 12 actually started?

10:27:28 13 A. When the ground -- when they broke ground,

10:27:29 14 originally.

10:27:31 15 Q. Well, in your opinion --

10:27:34 16 A. By started -- I mean, "started" can mean a

10:27:35 17 lot of different things so...

10:27:36 18 Q. Okay. And that's fair. In your experience

10:27:42 19 as a construction professional, what event represents

10:27:45 20 the start of construction on a building?

10:27:46 21 MR. TROUT: Object to the form of the question.

10:27:49 22 THE WITNESS: Well, it really depends on the type

10:27:53 23 of project. On our projects, it's demolition --

10:27:56 24 typically start. On a new project, it could be site

10:28:00 25 layout. It could be mobilization. Breaking ground is

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10:28:03 1 sometimes used by people when they finally break the  
 10:28:03 2 ground.  
 10:28:08 3 The schedule here in front of me shows the  
 10:28:14 4 initial date of May 7, 2007.  
 10:28:17 5 Q. (BY MR. WALKER) And that's item one to --  
 10:28:22 6 and it's denominated as excavate basement; is that  
 10:28:23 7 correct?  
 10:28:26 8 A. Yes, excavate basement.  
 10:28:32 9 Q. Okay. Why didn't you use May 7, 2007, as  
 10:28:37 10 the date for calculating the construction -- the start  
 10:28:38 11 of construction for purposes of measuring the  
 10:28:40 12 construction period?  
 10:28:42 13 MR. TROUT: Object to the form of the question.  
 10:28:49 14 THE WITNESS: I'm not sure I follow you. We were  
 10:28:54 15 talking about my affidavit and the liquidated damages,  
 10:28:58 16 and we were looking at the August '08 time frame.  
 10:29:01 17 So can you help me understand your question?  
 10:29:02 18 Q. (BY MR. WALKER) Yeah. The Construction  
 10:29:08 19 Management Agreement at paragraph 3.2.2 provides for a  
 10:29:10 20 6-month preconstruction period.  
 10:29:10 21 Do you recall that?  
 10:29:11 22 A. Yes.  
 10:29:14 23 Q. And it also called for an 18-month  
 10:29:15 24 construction period.  
 10:29:15 25 Do you recall that?

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10:29:15 1 A. Yes.  
 10:29:21 2 Q. Okay. And using what I assumed -- well, let  
 10:29:24 3 me ask you: How did you come up with the August 1,  
 10:29:31 4 2008, date? Did you use anything other than the  
 10:29:33 5 Construction Management Plan to come up with the  
 10:29:35 6 August 1, 2008, date?  
 10:29:37 7 MR. TROUT: Object to the form of the question.  
 10:29:41 8 THE WITNESS: That was a -- I looked at the  
 10:29:43 9 schedule in the Construction Management Plan, and that  
 10:29:47 10 was, as I recall, consistent with other subsequent  
 10:29:51 11 schedules, not particularly this schedule, which is  
 10:29:57 12 December of '07, but schedules subsequent to the  
 10:30:00 13 Construction Management Plan schedule; and that is  
 10:30:05 14 like February '07 that shows occupancy of August 1st.  
 10:30:08 15 Q. (BY MR. WALKER) Okay. And you can look  
 10:30:14 16 through the rest of those exhibits up through 157A to  
 10:30:18 17 confirm that the excavation date for the basement is  
 10:30:22 18 May 7th in all instances. And take your time if you  
 10:30:23 19 want to look at those.  
 10:30:27 20 However, back to my question: I'm wondering  
 10:30:31 21 why you didn't use May 7th, 2007, as the construction  
 10:30:36 22 date and then add 18 months to that to come up with  
 10:30:38 23 the occupancy date?  
 10:30:40 24 MR. TROUT: Object to the form of the question.  
 10:30:46 25 THE WITNESS: Well, the occupancy date shown in

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10:30:50 1 the original plan schedule is August 1, 2008, and  
 10:30:53 2 there were no change orders issued to any of the  
 10:30:59 3 subcontractors that extended their contract --  
 10:31:03 4 extended their contract date, excuse me, accordingly.  
 10:31:05 5 There was a change order issued to Petra  
 10:31:10 6 unrelated, in my opinion, irrelevant -- or excuse  
 10:31:16 7 me -- not relevant to the performances of their  
 10:31:17 8 contractors.  
 10:31:20 9 Q. (BY MR. WALKER) And in looking at your  
 10:31:23 10 affidavit, which is Exhibit No. 291, I believe, and  
 10:31:26 11 where you made the calculation of the liquidated  
 10:31:32 12 damages, you used \$500; is that correct, per day?  
 10:31:32 13 A. Yes.  
 10:31:36 14 Q. And you also used 44 contractors as a  
 10:31:40 15 multiplier?  
 10:31:40 16 A. Yes.  
 10:31:41 17 Q. Why did you do that?  
 10:31:49 18 A. The 44 contractors were those that had a  
 10:31:54 19 substantial completion date in their contract, and the  
 10:31:57 20 table that I attached, Exhibit A, identifies those  
 10:31:58 21 contractors.  
 10:32:09 22 Q. And so if we look at that table, which ones  
 10:32:16 23 in the table add up to 44? Can you tell us in summary  
 10:32:20 24 form how you went about counting them?  
 10:32:48 25 MR. TROUT: Object to the form.

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10:32:52 1 THE WITNESS: So essentially, it's every one of  
 10:32:59 2 the contractors on this list, and when I count, I get  
 10:33:02 3 a count of 44.  
 10:33:02 4 (Deposition Exhibit No. 326 marked.)  
 10:33:10 5 Q. (BY MR. WALKER) Okay. Mr. Amento, I'm  
 10:33:13 6 going to hand you what we've marked as Exhibit  
 10:33:20 7 No. 326, and take your time to look through the  
 10:33:24 8 documents included in Exhibit No. 326, and in  
 10:33:26 9 particular, I'd like you to take a look at the  
 10:33:31 10 substantial completion date that's listed on those  
 10:33:36 11 warranty sheets.  
 10:33:39 12 MR. TROUT: I'll object to the form of any  
 10:34:08 13 question that might be pending. I'll also object on  
 10:34:12 14 the basis that any question that might be pending may  
 10:34:45 15 call for a legal conclusion.  
 10:34:47 16 THE WITNESS: Okay. I've reviewed the exhibit,  
 10:34:47 17 thank you.  
 10:34:49 18 Q. (BY MR. WALKER) Mr. Amento, were you  
 10:34:53 19 informed by anyone that there was an agreement by and  
 10:34:57 20 among the City; Petra; and LCA, the architects to  
 10:35:00 21 apply a substantial completion date of October 15th,  
 10:35:04 22 2008, for purposes of the contracts?  
 10:35:05 23 MR. TROUT: Object to the form of the question.  
 10:35:11 24 It calls for speculation. Also calls for a legal  
 10:35:15 25 conclusion, and is not supported by any documentary

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10:35:17 1 evidence in this case.  
 10:35:20 2 Q. (BY MR. WALKER) I'm just asking you if  
 10:35:23 3 anybody informed you of such an agreement.  
 10:35:25 4 MR. TROUT: Object to the form on the same  
 10:35:26 5 grounds.  
 10:35:28 6 THE WITNESS: They did not.  
 10:35:31 7 Q. (BY MR. WALKER) Okay. Mr. Amento, you can  
 10:35:32 8 put that document aside.  
 10:35:36 9 If you would take a look back at Exhibit  
 10:35:41 10 No. 325, and that -- in particular, page CM114380,  
 10:35:48 11 which is marked Tab 3. 325 is the damages.  
 10:35:49 12 A. Oh, yes.  
 10:36:04 13 Q. Okay.  
 10:36:05 14 A. Pardon me. Which tab?  
 10:36:06 15 Q. Tab 3.  
 10:36:06 16 A. Okay.  
 10:36:12 17 Q. Which is CM114380.  
 10:36:12 18 A. Yes.  
 10:36:21 19 Q. And on this sheet, there are items which are  
 10:36:26 20 numbered 101 through 114.  
 10:36:27 21 Do you see that?  
 10:36:27 22 A. Yes.  
 10:36:31 23 Q. And the first item is -- it says, "Repair of  
 10:36:34 24 'clickers,' should have been a warranty item."  
 10:36:37 25 What do you mean by that and why would --

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10:38:05 1 is -- most of the items on this list are something  
 10:38:11 2 that will be opined by Mr. Weltner.  
 10:38:15 3 Q. Okay. And so you're relying on Mr. Weltner  
 10:38:18 4 for the facts supporting the calculation with respect  
 10:38:23 5 to item 101, "Repair of clickers"?  
 10:38:23 6 A. Yes.  
 10:38:27 7 Q. In each of these instances, the contractors  
 10:38:32 8 related to item 101, the City signed off on the change  
 10:38:34 9 orders; isn't that correct?  
 10:38:36 10 MR. TROUT: Object to the form of the question to  
 10:38:39 11 the extent it calls for a legal conclusion or is  
 10:38:44 12 unsupported by facts in evidence in this case.  
 10:38:46 13 THE WITNESS: For this particular one, I don't  
 10:38:50 14 know if I've seen a signed change order for this or  
 10:38:54 15 not. There are signed change orders in this project.  
 10:38:56 16 Q. (BY MR. WALKER) With regard to item 102,  
 10:39:02 17 Alpha Masonry, Change Order No. 2, provide new cap  
 10:39:03 18 stones, \$1,079.  
 10:39:07 19 Why did you include that element in your  
 10:39:07 20 damage calculation?  
 10:39:11 21 A. That is also an item that Mr. Weltner will  
 10:39:12 22 testify about.  
 10:39:16 23 Q. And where did the \$1,079 come from?  
 10:39:20 24 A. I don't know. I assume that's the amount in  
 10:39:23 25 the Change Order No. 2, or a part of Change Order

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10:36:41 1 well, let me start there. Why did you include "repair  
 10:36:43 2 of clickers" in your damages calculation?  
 10:36:48 3 A. Well, this is a -- this is a summary of a  
 10:36:54 4 number of change orders, which should not have been  
 10:36:58 5 issued to the contractors, because the work included  
 10:37:02 6 in these change orders should have been included in  
 10:37:03 7 their contract.  
 10:37:05 8 Q. And which contracts are you specifically  
 10:37:07 9 referring to?  
 10:37:10 10 A. Well, there's several different contracts.  
 10:37:15 11 There is one for Custom Glass, one for K & B  
 10:37:20 12 Fabrication, and for Cobblestone. They are all listed  
 10:37:22 13 next to the various items.  
 10:37:26 14 Q. And so why would "repair of clickers" not  
 10:37:30 15 be -- or why would "repair of clickers" should have  
 10:37:33 16 been included in the original scope of the work of  
 10:37:35 17 those contractors?  
 10:37:40 18 A. Well, if the -- if the clickers were  
 10:37:44 19 defective, not properly installed, that would be  
 10:37:48 20 something that the contractor has an obligation to  
 10:37:50 21 provide and perform.  
 10:37:52 22 Q. Is it your information that the clickers  
 10:37:57 23 resulted from some product not being properly  
 10:37:58 24 installed?  
 10:38:02 25 A. I have not looked deeply into this. This

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10:39:24 1 No. 2.  
 10:39:26 2 Q. And is it your testimony that Mr. Weltner  
 10:39:28 3 provided that number?  
 10:39:30 4 A. He will testify as to that number and the  
 10:39:34 5 reason for its inclusion in this damage claim.  
 10:39:41 6 Q. Item 103, Axelson, Phase 4, Change Order  
 10:39:44 7 No. 3, repair construction damage.  
 10:39:46 8 Why is that item or element included in your  
 10:39:47 9 damage calculation?  
 10:39:50 10 A. Same answer as for No. 102.  
 10:39:58 11 Q. And so I'm assuming that the \$3,127 came  
 10:39:59 12 from Mr. Weltner to you?  
 10:40:02 13 A. It came on this sheet. Mr. Weltner in  
 10:40:07 14 conjunction with Mr. Trout's office. But, again,  
 10:40:11 15 Mr. Weltner will provide testimony in regards to this  
 10:40:12 16 particular item.  
 10:40:15 17 Q. Mr. Amento, did you look at Axelson  
 10:40:18 18 Construction Change Order No. 3?  
 10:40:22 19 A. If I have, I don't recall. Not recently.  
 10:40:28 20 Q. You don't recall what was included in Change  
 10:40:29 21 Order No. 3?  
 10:40:30 22 A. No.  
 10:40:34 23 Q. Moving on to item 104, Buss Mechanical,  
 10:40:39 24 Change Order No. 2 in the amount of \$2,525.  
 10:40:43 25 Why did you include item 104 in your damage

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10:40:43 1 calculation?

10:40:46 2 A. Again, this is an item that Mr. Weltner will

10:40:46 3 testify about.

10:40:49 4 Q. Did you review Buss Mechanical Change Order

10:40:50 5 No. 2?

10:40:52 6 A. Not recently.

10:40:55 7 Q. Do you recall what was included in Change

10:41:02 8 Order No. 2?

10:41:03 9 A. I do not.

10:41:08 10 Q. Moving on to item 105, Cobblestone, Change

10:41:10 11 Order No. 2, re-worked areas, \$2,175.

10:41:14 12 Why did you include item 105 in your damage

10:41:14 13 calculation?

10:41:17 14 A. This is, again, something that Mr. Weltner

10:41:18 15 will testify about.

10:41:22 16 Q. Have you reviewed Cobblestone Change Order

10:41:23 17 No. 2?

10:41:24 18 A. Not recently.

10:41:27 19 Q. So as you sit here today, you can't recall

10:41:30 20 what was included in Change Order No. 2?

10:41:31 21 A. I cannot.

10:41:36 22 Q. Item 106, Commercial Painting, Phase 3,

10:41:41 23 Change Order No. 7, paint prep Rule Steel material,

10:41:43 24 \$2,412.

10:41:47 25 Why did you include item 106 in your damage

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10:41:47 1 calculation?

10:41:49 2 A. Again, this is something that Mr. Weltner

10:41:51 3 will provide testimony on.

10:41:54 4 Q. Do you recall whether you reviewed

10:41:59 5 Commercial Painting, Phase 3, Change Order No. 7?

10:42:02 6 A. I have not reviewed it recently.

10:42:05 7 Q. So as you sit here today, you can't recall

10:42:08 8 what was included in Change Order No. 7; is that

10:42:09 9 correct?

10:42:10 10 A. That's correct.

10:42:19 11 Q. Item 107, Custom Glass, Phase 2, \$1,704.

10:42:22 12 Why did you include item 107 in your damage

10:42:23 13 calculation?

10:42:27 14 A. Again, this is an item that Mr. Weltner will

10:42:28 15 provide testimony.

10:42:32 16 Q. And as you sit here today, can you recall

10:42:37 17 reviewing Custom Glass, Phase 2, Change Order No. 2?

10:42:38 18 A. Not recently.

10:42:42 19 Q. I know you haven't reviewed it recently, but

10:42:45 20 can you recall whether you reviewed Change Order

10:42:46 21 No. 2?

10:42:46 22 A. I can't recall.

10:42:54 23 Q. Item 108, K & B Fabrication, Change Order

10:42:57 24 No. 2, rework to meet code, 4,197.

10:43:02 25 Why did you include item 108 in your damage

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10:43:02 1 calculation?

10:43:06 2 A. This is an item that Mr. Weltner will

10:43:06 3 provide testimony.

10:43:10 4 Q. In order to short cut this, because I have a

10:43:13 5 sense from your previous answers that as to each of

10:43:19 6 these items 108 through -- at least 113, you are

10:43:22 7 relying on Mr. Weltner for the information that's

10:43:27 8 contained in the change orders; is that a fair

10:43:28 9 statement?

10:43:33 10 A. It's fair for everything except for 110.

10:43:38 11 Q. Okay. 110 is Rule Steel, Change Order

10:43:42 12 No. 3, 30-day float was not set against weather

10:43:44 13 extension; and then there is two question marks.

10:43:46 14 Are those your question marks?

10:43:49 15 A. No, those aren't my question marks. But

10:43:53 16 the -- this is a change order that was issued to Rule

10:44:01 17 Steel by which Petra considered time extension

10:44:08 18 requests that were submitted by Rule Steel against the

10:44:12 19 fact that Rule Steel was very late in completion of

10:44:16 20 their performed work, and in doing so, issued a change

10:44:21 21 order that netted out the amount of delays against

10:44:24 22 some of the time extensions that Rule Steel had

10:44:26 23 requested.

10:44:28 24 What is not in there is any consideration

10:44:33 25 for the 30-day float provision provided in Rule

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10:44:37 1 Steel's contract. And also what was absent was --

10:44:43 2 seemingly the analysis performed by Petra overlooked

10:44:48 3 the fact that not just 75 days initially were involved

10:44:54 4 in the difference between the planned completion and

10:44:58 5 actual completion. It was probably more like 135

10:45:00 6 days.

10:45:05 7 Q. What do you mean when you refer to the

10:45:09 8 30-day float? What does that mean?

10:45:12 9 A. We discussed this in our previous deposition

10:45:17 10 where we walked through the contract and looked at the

10:45:21 11 provisions in regards to float.

10:45:24 12 Q. And could you refresh my recollection with

10:45:28 13 regard to what you mean by the term "30-day float."

10:45:30 14 MR. TROUT: Object to the form of the question.

10:45:34 15 It's been asked and answered.

10:45:36 16 THE WITNESS: The provision in the contract

10:45:44 17 provides that the contractor has -- well, essentially,

10:45:48 18 there is a 30-day -- I'll use the term "allowance" --

10:45:53 19 in the subcontract, whereas the -- the project could

10:45:58 20 be delayed by 30 days before the contractor is

10:46:02 21 entitled to any time extension or additional

10:46:03 22 compensation.

10:46:05 23 Q. (BY MR. WALKER) Okay. And is it your

10:46:08 24 position that each contractor has a 30-day float?

10:46:10 25 MR. TROUT: Object to the form of the question to

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10:46:13 1 the extent it may call for a legal conclusion. The  
 10:46:18 2 contracts speak for themselves.  
 10:46:20 3 THE WITNESS: Every contract with the trade  
 10:46:24 4 contractors is the same, and they all have a 30-day  
 10:46:25 5 float provision in the contract.  
 10:46:30 6 Q. (BY MR. WALKER) So using your 44  
 10:46:33 7 contractors, if we multiply that times the 30-day  
 10:46:36 8 float, it would give us an allowance, to use your  
 10:46:40 9 term, that the project could be delayed before each of  
 10:46:43 10 the prime contractors were entitled to compensation;  
 10:46:44 11 is that your testimony?  
 10:46:46 12 MR. TROUT: Object to the form of the question.  
 10:46:49 13 The contracts speak for themselves, and I'll object on  
 10:46:53 14 the basis of any call for a legal conclusion.  
 10:46:55 15 Q. (BY MR. WALKER) I'm asking for your  
 10:46:58 16 opinion, Mr. Amento, as a construction professional.  
 10:46:59 17 MR. TROUT: Same objection.  
 10:47:01 18 THE WITNESS: Well, if you look at each  
 10:47:06 19 individual contract, it provides a 30-day float. So  
 10:47:12 20 if the contractor is delayed during their performance,  
 10:47:16 21 the owner does not have to issue a time extension or  
 10:47:19 22 provide additional compensation until that 30-day  
 10:47:22 23 float period has been exhausted.  
 10:47:28 24 Q. (BY MR. WALKER) Okay. Now, I take it your  
 10:47:34 25 answers to 109, 111, 112, and 113, would be as you

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10:49:08 1 conditions.  
 10:49:11 2 Q. What was that amount that they were paid  
 10:49:13 3 above and beyond the allowance?  
 10:49:33 4 A. Well, there's -- there's two figures that I  
 10:49:37 5 came up with. It's not clear which of those figures  
 10:49:43 6 is correct. If you look at the job cost detail that  
 10:49:46 7 Petra provided for the project and maintained, it  
 10:49:53 8 shows entries and payments to TMC in the amount of  
 10:50:07 9 25,293. If you look at the amounts on a variety of  
 10:50:12 10 pay applications for TMC winter conditions, that total  
 10:50:20 11 is 20,687, so somewhere between 20,000 and 25,000  
 10:50:24 12 roughly is the amount that was paid via change order  
 10:50:30 13 to TMC for winter conditions and when in fact they had  
 10:50:34 14 an allowance already built into their lump sum of  
 10:50:35 15 \$40,000.  
 10:50:38 16 Q. And why is that a claim against Petra rather  
 10:50:41 17 than a claim against TMC?  
 10:50:42 18 MR. TROUT: Object to the form.  
 10:50:45 19 THE WITNESS: Because Petra was the one that  
 10:50:49 20 represented the owner's interest and Petra was the one  
 10:50:50 21 that authorized payments, recommended the change  
 10:50:55 22 order, signed the change order, and also certified the  
 10:50:58 23 payment applications by which this money was paid to  
 10:51:00 24 TMC.  
 10:51:01 25 Q. (BY MR. WALKER) Do you recall whether or

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10:47:39 1 responded to 101 through 108; is that correct?  
 10:47:48 2 A. 101 through 109, yes. 111, 112, 113, yes.  
 10:47:54 3 Q. Okay. Then you have -- let's look at 113,  
 10:47:59 4 "Tamoseal in lieu of PVC/S.S. attachments in entry  
 10:48:01 5 pools."  
 10:48:04 6 Why did you include the 113 in your damage  
 10:48:04 7 calculation?  
 10:48:08 8 A. Again, this is an item that Mr. Weltner will  
 10:48:09 9 provide testimony.  
 10:48:13 10 Q. Have you seen any change orders related to  
 10:48:18 11 the substitution of Tamoseal for the PVC liner?  
 10:48:21 12 MR. TROUT: Object to the form of the question.  
 10:48:22 13 THE WITNESS: I don't believe I have.  
 10:48:27 14 Q. (BY MR. WALKER) At least as you sit here  
 10:48:31 15 today, you don't recall seeing a change order for  
 10:48:36 16 substitution of Tamoseal for the PVC liner?  
 10:48:38 17 MR. TROUT: Same objection. Object to the form.  
 10:48:38 18 THE WITNESS: That's correct.  
 10:48:42 19 Q. (BY MR. WALKER) With regard to 114, winter  
 10:48:45 20 conditions, \$40,000, why did you include that in your  
 10:48:46 21 damages calculation?  
 10:48:50 22 A. The \$40,000 is an allowance that was  
 10:48:57 23 included in the TMC contract, however, despite the  
 10:49:04 24 allowance, TMC was paid additional money above and  
 10:49:08 25 beyond their lump sum contract amount for winter

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10:51:05 1 not LCA, the architects, also certified the pay  
 10:51:08 2 applications you are referring to?  
 10:51:10 3 MR. TROUT: Object to the form to the extent it  
 10:51:12 4 may call for a legal conclusion.  
 10:51:16 5 THE WITNESS: The payment applications also have  
 10:51:21 6 LCA's signature or a representative of LCA on the  
 10:51:23 7 payment application.  
 10:51:26 8 Q. (BY MR. WALKER) Let's turn to page  
 10:51:33 9 CM114381, which is Tab 4. And, actually, Tab 4  
 10:51:41 10 includes several pages, up through CM114384.  
 10:51:42 11 Do you see that?  
 10:51:42 12 A. Yes.  
 10:51:47 13 Q. The estimated cost column has dashes instead  
 10:51:48 14 of amounts.  
 10:51:49 15 Why is that?  
 10:51:56 16 A. No -- it is my understanding no calculation  
 10:52:01 17 has been made as to the individual amount of all of  
 10:52:06 18 this closeout documentation, extra materials, and  
 10:52:12 19 warranties that weren't provided to the owner.  
 10:52:15 20 Q. And how is it that you know that these items  
 10:52:17 21 weren't provided to the owner?  
 10:52:23 22 A. This is a list that was prepared by the  
 10:52:30 23 owner. I think Mr. Watts was instrumental in  
 10:52:34 24 preparing this with Mr. Trout's office, and it is my  
 10:52:40 25 expectation that Mr. Watts and also Mr. Weltner will

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10:52:42 1 provide testimony in regards to all of these items.  
 10:52:45 2 Q. And what about as to the amounts? Are there  
 10:52:48 3 going to be amounts filled in at some point in time?  
 10:52:54 4 A. Well, it's not my expectation it will be  
 10:52:57 5 amounts, but these are additional -- this is just  
 10:53:01 6 further evidence that the -- Petra failed in their  
 10:53:05 7 duties to properly represent the owner's interests and  
 10:53:10 8 make sure that the various contractors provided all of  
 10:53:16 9 the -- all of these items to the owner in fulfillment  
 10:53:18 10 with their contract.  
 10:53:21 11 Q. And do you anticipate that you will be  
 10:53:23 12 testifying at trial with respect to any of the amounts  
 10:53:30 13 assigned to the items that are included within Tab 4?  
 10:53:35 14 A. I'm not sure amounts will be added to Tab 4,  
 10:53:39 15 but, again, this is more evidence as to the care and  
 10:53:42 16 custody or lack of -- not care and custody, but the  
 10:53:51 17 standard of care that was -- the standard of care by  
 10:53:54 18 which Petra conducted business on the project.  
 10:53:59 19 Q. Okay. With regard to Tab 4, item 1, extra  
 10:54:01 20 materials, what do you mean by that?  
 10:54:09 21 A. The contract required that extra materials,  
 10:54:13 22 unit pavers, in this case, had to be provided to the  
 10:54:18 23 City. Extra materials, spare parts, et cetera, there  
 10:54:22 24 in the case of breakage, they are to be provided by  
 10:54:26 25 whichever contractor was responsible for the spec

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10:55:53 1 to be provided in accordance with the contract  
 10:55:58 2 specifications by the various contractors performing  
 10:55:58 3 the work.  
 10:56:00 4 Q. So it's your understanding that the  
 10:56:05 5 warranties haven't been delivered to the owner -- is  
 10:56:06 6 that your understanding?  
 10:56:06 7 A. Yes.  
 10:56:09 8 Q. Do you know whether or not the City has  
 10:56:13 9 submitted any warranty claims with respect to any of  
 10:56:17 10 the items listed under item 2, special warranties?  
 10:56:19 11 MR. TROUT: Object to the form of the question to  
 10:56:23 12 the extent it may call for a legal conclusion.  
 10:56:26 13 THE WITNESS: I know on some of these, for  
 10:56:29 14 instance, in regards to the roof, the City has been  
 10:56:38 15 working with the roofing contractor, Western, on some  
 10:56:40 16 defects and repairs on the roofs.  
 10:56:42 17 Q. (BY MR. WALKER) Mr. Amento, are you aware  
 10:56:46 18 of any of the contractors who have refused to perform  
 10:56:50 19 warranty work because there was no warranty allegedly  
 10:56:52 20 delivered to the owner.  
 10:56:54 21 MR. TROUT: Object to the form of the question to  
 10:56:57 22 the extent it may call for a legal conclusion, and it  
 10:56:59 23 assumes facts not in evidence.  
 10:57:01 24 THE WITNESS: I'm not aware of any contractor  
 10:57:04 25 that has refused to perform work.

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10:54:29 1 section 2780.  
 10:54:32 2 Q. And what is the letter "N" in the extra  
 10:54:34 3 materials column, what does that mean?  
 10:54:37 4 A. Apparently that means that they were not  
 10:54:37 5 provided.  
 10:54:41 6 Q. And you are relying upon the representation  
 10:54:45 7 or the testimony of Mr. Watts for that position?  
 10:54:49 8 A. It would be Mr. Watts and/or Mr. Weltner,  
 10:54:49 9 yes.  
 10:54:53 10 Q. With regard to the next item down -- the  
 10:54:59 11 tile, extra material. It says, "LTD." What is your  
 10:55:01 12 understanding of what that stands for?  
 10:55:03 13 A. That looks like a limited amount was  
 10:55:07 14 provided, not the box as required.  
 10:55:16 15 Q. And then we've got question marks on down  
 10:55:20 16 under item 1. There is question marks for extra paint  
 10:55:22 17 and extra stain.  
 10:55:26 18 Do you know why the question marks are  
 10:55:26 19 there?  
 10:55:29 20 A. I think that item still has not been  
 10:55:33 21 verified as to whether it was provided in its entirety  
 10:55:37 22 as required by the referenced spec section.  
 10:55:41 23 Q. And item 2 is entitled "special warranties."  
 10:55:45 24 What's your understanding of what that means?  
 10:55:50 25 A. These are warranties that are provided -- or

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10:57:07 1 Q. (BY MR. WALKER) Okay. Let's turn to page  
 10:57:13 2 CM114383, and on that page appears item 3,  
 10:57:19 3 "Submittals/closeout."  
 10:57:22 4 Do you know why those items were included in  
 10:57:24 5 Tab 4?  
 10:57:27 6 A. Yes. Again, these are documentations  
 10:57:35 7 including certifications, O&M manuals, balance  
 10:57:39 8 reports, those types of documents that are required  
 10:57:43 9 per specification. Some of which were provided  
 10:57:50 10 incompletely, hence the entry for "limited," some of  
 10:57:52 11 which were not provided at all.  
 10:57:54 12 Q. With regard to any of the items listed in  
 10:57:57 13 Tab 4, did you make an independent -- or did you  
 10:58:00 14 conduct an independent investigation as to whether or  
 10:58:02 15 not these items were provided to the owner?  
 10:58:02 16 A. I did not.  
 10:58:10 17 Q. Let's turn to page CM114385, which is Tab 5.  
 10:58:17 18 Can you tell me why these items were  
 10:58:21 19 included in the damage claim against Petra?  
 10:58:25 20 A. These are costs which the City has incurred  
 10:58:33 21 post completion of the project to perform repairs or  
 10:58:37 22 adjustment to systems, or in the case of item 6,  
 10:58:45 23 repairs that stem from defective or incomplete work.  
 10:58:48 24 Q. And what defective or incomplete work  
 10:58:52 25 resulted in the damage/repairs/cleanup,

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10:58:58 1 sewer/leaks/drains and performed by Ultra-Clean for  
 10:59:02 2 38,365.94?  
 10:59:04 3 A. It is my understanding there was a poorly  
 10:59:10 4 functioning or defective back flow valve and sewage  
 10:59:17 5 backed up into a restroom on the first floor, and from  
 10:59:23 6 there, it flowed into an HVAC grill down into the duct  
 10:59:28 7 work into the walls and floors -- or maybe not the  
 10:59:32 8 walls, but certainly the floors requiring a fair  
 10:59:36 9 amount of demolition and clean up, sanitation, and  
 10:59:36 10 repair.  
 10:59:39 11 Q. Do you know when that occurred, when this  
 10:59:40 12 flood occurred?  
 10:59:41 13 A. Fairly recently.  
 10:59:44 14 Q. And why would that be an item that would be  
 10:59:46 15 Petra's responsibility?  
 10:59:51 16 A. Well, if in fact the work was not properly  
 10:59:55 17 installed in accordance with the contract documents,  
 11:00:00 18 it was Petra's responsibility to -- as the owner's rep  
 11:00:03 19 to make sure that the work was installed in accordance  
 11:00:07 20 with the contract, that's why they were there. That  
 11:00:08 21 was part of their obligations.  
 11:00:11 22 Q. Is it your understanding that this back flow  
 11:00:14 23 valve that you referred to, which I've also heard  
 11:00:18 24 referred to as a back water valve in the sewer line,  
 11:00:20 25 whether or not that was specified in the plans and

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11:01:20 1 A. I do not.  
 11:01:21 2 MR. TROUT: Object to the form.  
 11:01:23 3 Q. (BY MR. WALKER) And secondly, as you sit  
 11:01:26 4 here today, you don't know whether or not the back  
 11:01:29 5 water valve was improperly installed, do you?  
 11:01:30 6 MR. TROUT: Object to the form.  
 11:01:33 7 THE WITNESS: I do not. So this particular tab  
 11:01:39 8 is one that the City, specifically Mr. Watts will  
 11:01:42 9 provide testimony in regards to the facts behind these  
 11:01:43 10 damages.  
 11:01:45 11 Q. (BY MR. WALKER) With regard to the back  
 11:01:48 12 water valve issue, do you know which contractor  
 11:01:51 13 installed the back water valve?  
 11:01:54 14 MR. TROUT: Object to the form.  
 11:01:55 15 THE WITNESS: I do not.  
 11:01:57 16 Q. (BY MR. WALKER) Do you know who the  
 11:02:00 17 manufacturer of the back water valve was?  
 11:02:01 18 MR. TROUT: Same objection.  
 11:02:02 19 THE WITNESS: I do not.  
 11:02:03 20 Q. (BY MR. WALKER) Do you know what caused the  
 11:02:07 21 back water valve to not perform as it was designed?  
 11:02:08 22 MR. TROUT: Same objection.  
 11:02:09 23 THE WITNESS: I do not.  
 11:02:10 24 Q. (BY MR. WALKER) No one has told you that  
 11:02:13 25 there was a foreign object lodged in it as a

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11:00:21 1 specifications?  
 11:00:22 2 MR. TROUT: Object to the form.  
 11:00:25 3 THE WITNESS: I haven't conducted an independent  
 11:00:25 4 review of that.  
 11:00:28 5 Q. (BY MR. WALKER) Okay. If the back water  
 11:00:31 6 valve was included in the plans and specifications,  
 11:00:34 7 what would be the basis for any claim against Petra  
 11:00:38 8 for any damage resulting from that item?  
 11:00:40 9 A. If it was included?  
 11:00:41 10 Q. Correct.  
 11:00:43 11 MR. TROUT: Same objection, and object on the  
 11:00:45 12 basis that it calls for a legal conclusion.  
 11:00:48 13 Q. (BY MR. WALKER) I'm just asking for your  
 11:00:50 14 opinion as a construction professional.  
 11:00:51 15 MR. TROUT: Same objection.  
 11:00:54 16 THE WITNESS: So if it was included but not  
 11:00:58 17 properly installed by the contractor, certainly the  
 11:01:02 18 owner is going to look to Petra as the construction  
 11:01:06 19 manager to take care of the problem. It was Petra's  
 11:01:10 20 obligation to make sure the work was all properly  
 11:01:11 21 installed.  
 11:01:13 22 Q. (BY MR. WALKER) But as you sit here today,  
 11:01:16 23 first of all, you don't whether or not the back water  
 11:01:19 24 valve was included in the plans and specifications; is  
 11:01:20 25 that correct?

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11:02:17 1 consequence of someone flushing a foreign object down  
 11:02:18 2 the toilet?  
 11:02:20 3 MR. TROUT: Same objection.  
 11:02:22 4 THE WITNESS: No, I do not know that.  
 11:02:32 5 Q. (BY MR. WALKER) Let's look to Tab 6, which  
 11:02:38 6 is entitled "HVAC" on page CM114386.  
 11:02:38 7 Are you there?  
 11:02:39 8 A. Yes.  
 11:02:42 9 Q. And why were these items included in the  
 11:02:45 10 damage calculation that you are testifying about?  
 11:02:49 11 A. This particular category is in regards to  
 11:02:57 12 the HVAC system. In my previous depositions, we've  
 11:02:59 13 talked about some of the problems with the HVAC  
 11:03:05 14 system, the fact that I think approximately 50 of the  
 11:03:11 15 dampers were hung up and not correctly functioning.  
 11:03:14 16 There has been problems with the temperature  
 11:03:22 17 controls in the HVAC system in terms of too cold in  
 11:03:22 18 the summertime.  
 11:03:27 19 There has been air speed that has fluctuated  
 11:03:32 20 wildly at times. There have been problems with the  
 11:03:37 21 glycol system in the chiller loop.  
 11:03:40 22 And so as a result of that, the City has  
 11:03:43 23 spent a fair amount of time trying to chase these  
 11:03:47 24 down, trying to rectify the problem. As of recently  
 11:03:51 25 they have hired an individual by the name of Tim

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11:03:54 1 Petsche who has conducted an investigation and is in  
 11:03:59 2 the process of preparing recommendations that in turn  
 11:04:02 3 will be priced. And the preliminary estimate for  
 11:04:06 4 those repairs is \$250,000.  
 11:04:09 5 Q. And where did that number come from,  
 11:04:11 6 \$250,000?  
 11:04:14 7 A. I think that's a range of magnitude number  
 11:04:18 8 that's been established until the Petsche report is  
 11:04:22 9 complete and a contractor or contractors can price it.  
 11:04:25 10 Q. So it's your anticipation that sometime  
 11:04:27 11 before trial that will be completed?  
 11:04:28 12 A. Yes, it is.  
 11:04:30 13 Q. With regard to -- you mentioned several  
 11:04:34 14 items and let's just briefly visit those. Dampers;  
 11:04:36 15 you indicated that your understanding is that there  
 11:04:40 16 was around 50 dampers that didn't work properly.  
 11:04:42 17 Was that your testimony?  
 11:04:42 18 A. Yes.  
 11:04:45 19 Q. Do you know why they didn't work properly?  
 11:04:46 20 A. I do not know why.  
 11:04:49 21 Q. Do you know who installed the dampers?  
 11:04:53 22 A. The HVAC contractor.  
 11:04:56 23 Q. And do you know who that was by name?  
 11:05:00 24 A. I don't recall.  
 11:05:03 25 Q. Okay. This isn't a memory test. It's

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11:05:05 1 Hobson Fabricating.  
 11:05:07 2 Does that refresh your recollection?  
 11:05:08 3 A. It might.  
 11:05:11 4 Q. Do you know whether or not the subject  
 11:05:15 5 dampers that you've referred to as being  
 11:05:18 6 malfunctioning, whether or not those were originally  
 11:05:21 7 installed by Hobson as the HVAC installer?  
 11:05:24 8 A. I do not know that. I assume that they --  
 11:05:28 9 if Hobson was the HVAC contractor, they would have  
 11:05:29 10 installed those.  
 11:05:32 11 Q. And do you know whether or not any other  
 11:05:35 12 person or entity moved the dampers after they were  
 11:05:38 13 installed by Hobson?  
 11:05:39 14 MR. TROUT: Object to the form of the question.  
 11:05:41 15 Q. (BY MR. WALKER) The question is simple, do  
 11:05:42 16 you know?  
 11:05:42 17 A. I do not.  
 11:05:43 18 MR. TROUT: Same objection.  
 11:05:44 19 Q. (BY MR. WALKER) With regard to the  
 11:05:47 20 controls, what's the -- you mentioned that it was too  
 11:05:50 21 cold in the summer and too warm in the winter, is that  
 11:05:51 22 your testimony?  
 11:05:54 23 A. That's the big picture, yes. And air  
 11:05:56 24 fluctuations.  
 11:05:59 25 Q. And those are related items, in your

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11:06:03 1 opinion, air speed fluctuation and controls?  
 11:06:04 2 A. I don't know. I mean, again, I'm going to  
 11:06:07 3 rely on Mr. Petsche who is conducting the  
 11:06:11 4 investigation as we speak on all of the HVAC issues.  
 11:06:14 5 Q. Are you aware that -- as to whether or not  
 11:06:19 6 Heery International commissioned the HVAC system?  
 11:06:20 7 A. There is --  
 11:06:23 8 MR. TROUT: Object to the form of the question.  
 11:06:25 9 THE WITNESS: They were involved with the  
 11:06:29 10 project, but nobody has been able to find the  
 11:06:33 11 commissioning reports to verify that, in fact, they  
 11:06:37 12 did commission the system. And also to verify they  
 11:06:40 13 commissioned it correctly and completely.  
 11:06:42 14 Q. (BY MR. WALKER) You haven't had an  
 11:06:46 15 opportunity to review Heery's final report dated in  
 11:06:47 16 May of 2009?  
 11:06:49 17 A. I think I've seen parts of it.  
 11:06:52 18 Q. And isn't that the final report?  
 11:06:53 19 A. I don't recall.  
 11:07:00 20 Q. With regard to the glycol. What's the issue  
 11:07:03 21 there, and why would Petra -- well, let me ask that  
 11:07:07 22 first. What's the issue with regard to the glycol?  
 11:07:09 23 A. I'd refer you to Mr. Petsche.  
 11:07:11 24 Q. Do you know whether or not glycol was  
 11:07:15 25 specified in the original plans and specifications?

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11:07:16 1 MR. TROUT: Object to the form.  
 11:07:17 2 THE WITNESS: I believe it was added by a change  
 11:07:18 3 order.  
 11:07:20 4 Q. (BY MR. WALKER) Have you seen that change  
 11:07:21 5 order?  
 11:07:21 6 A. Yes.  
 11:07:23 7 Q. And do you recall the date on the change  
 11:07:24 8 order?  
 11:07:24 9 A. No.  
 11:07:30 10 Q. With regard to these estimates, item 1,  
 11:07:35 11 \$10,000, who are you relying on for that estimate?  
 11:07:41 12 A. The estimate will be whatever his costs are  
 11:07:43 13 to perform his investigation. That's, again, a range  
 11:07:48 14 of magnitude number. He is performing his  
 11:07:52 15 investigation and finishing his report as we speak.  
 11:07:57 16 Q. Do you have an idea of when that report will  
 11:08:01 17 be completed?  
 11:08:10 18 A. Well, I think it is scheduled to be  
 11:08:14 19 completed within the next two weeks.  
 11:08:20 20 Q. I'm assuming that the next item, "System  
 11:08:25 21 testing/runs by Tim Petsche," the estimated cost is,  
 11:08:27 22 again, just an estimate; is that right?  
 11:08:27 23 A. That's correct.  
 11:08:32 24 Q. "ZGA oversight," it says, "TBD."  
 11:08:34 25 What does that mean?

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11:08:42 1 A. That is really a place holder. If ZGA is  
 11:08:46 2 required to do any sort of oversight in addition to  
 11:08:52 3 the construction management provided on the lines  
 11:08:55 4 below, so it is a place holder at this point.  
 11:08:58 5 Q. And when do you expect that the place holder  
 11:09:01 6 will either be removed or completed?  
 11:09:03 7 A. It's my expectation once Mr. Petsche  
 11:09:08 8 finishes his report and submits his report then the  
 11:09:10 9 sheet would be finalized.  
 11:09:13 10 Q. With regard to item 2,  
 11:09:17 11 "Plans/specifications, performed by engineering."  
 11:09:18 12 What do you mean by engineering?  
 11:09:25 13 A. Well, on that, I think that it may not be --  
 11:09:29 14 depending on what his report recommends, there may be  
 11:09:32 15 an independent engineer that provides recommendations.  
 11:09:35 16 It would be my expectation that most of the  
 11:09:38 17 recommendations will be performed by Mr. Petsche.  
 11:09:42 18 Q. And when do you expect the place holder for  
 11:09:45 19 engineering, item 2, to be either removed or  
 11:09:46 20 completed?  
 11:09:46 21 A. Within two weeks.  
 11:09:50 22 Q. About we've got item 3, "Bid  
 11:09:55 23 management/oversight, Laura Knothe, \$5,000."  
 11:09:57 24 Where did that number come from?  
 11:10:01 25 A. That is a range of magnitude number for her

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11:11:27 1 A. He told me he was working on his report.  
 11:11:31 2 And part of his report, the observation portion, was  
 11:11:37 3 issued a day or two ago. I think I received it either  
 11:11:40 4 Tuesday or yesterday.  
 11:11:42 5 Q. Do you have that report with you, because I  
 11:11:45 6 don't think I've seen it.  
 11:11:47 7 MR. TROUT: It's been sent to you, Counsel.  
 11:11:52 8 There is an email message confirming receipt from Pam  
 11:11:56 9 in your office which we have in our files.  
 11:11:58 10 MR. WALKER: Okay. I just haven't seen it, I  
 11:12:03 11 was -- it has been served on us, Mr. Trout?  
 11:12:04 12 MR. TROUT: Yes.  
 11:12:06 13 MR. WALKER: Do you know when it was served on  
 11:12:08 14 us?  
 11:12:10 15 MR. TROUT: I don't for sure. I just remember  
 11:12:11 16 over the course of the last couple of days seeing the  
 11:12:14 17 confirmation back from Pam that it had been received.  
 11:12:15 18 MR. WALKER: Okay.  
 11:12:17 19 Q. (BY MR. WALKER) With regard to item 4,  
 11:12:22 20 "HVAC repairs/corrections, \$250,000" -- I recall your  
 11:12:24 21 testimony with regard to that number as being a range  
 11:12:27 22 of magnitude; is that your testimony?  
 11:12:27 23 A. Yes.  
 11:12:31 24 Q. What do you mean by range of magnitude?  
 11:12:32 25 A. It's an estimate.

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11:10:09 1 services as an owner's representative to solicit bids,  
 11:10:12 2 review bids, select the contractor on a competitive  
 11:10:18 3 basis to perform this work, and start the project, and  
 11:10:23 4 then the construction administration on her behalf is  
 11:10:25 5 down below in item 5.  
 11:10:30 6 Q. Have you discussed any of these items that  
 11:10:33 7 appear on Tab 6 with Ms. Knothe?  
 11:10:34 8 A. Not specifically.  
 11:10:37 9 Q. What about with Mr. Petsche? Have you  
 11:10:40 10 discussed these items listed in Tab 6 with  
 11:10:41 11 Mr. Petsche?  
 11:10:42 12 A. Yes.  
 11:10:44 13 Q. And when did you do that?  
 11:10:48 14 A. I had a conversation with him about two or  
 11:10:49 15 three days ago.  
 11:10:53 16 Q. And what did you say to him and what did he  
 11:10:54 17 say to you?  
 11:10:56 18 A. Oh, I talked to him about the status of his  
 11:11:03 19 review and the things that he was conducting. I saw a  
 11:11:07 20 preliminary report. I asked him when his -- his  
 11:11:14 21 report would be issued. And we basically talked about  
 11:11:18 22 the status and the process once he would issue a  
 11:11:20 23 report what would be required in terms of the contract  
 11:11:22 24 or contractors to price it.  
 11:11:24 25 Q. And what did he tell you?

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11:12:36 1 Q. And it doesn't -- I mean, it looks like we  
 11:12:40 2 have got a fixed number here of 250,000. I don't  
 11:12:42 3 understand the use of the term "range."  
 11:12:46 4 A. Well, range of magnitude, I'm using the --  
 11:12:49 5 the term interchangeably with the preliminary  
 11:12:49 6 estimate.  
 11:12:57 7 Q. So is 250,000 the upper range or the lower  
 11:12:58 8 range?  
 11:13:02 9 A. I don't think it's a range. I think it's an  
 11:13:07 10 estimate, so range of magnitude may be misleading in  
 11:13:09 11 that regard.  
 11:13:13 12 Q. That's fine. I just wanted to clarify that.  
 11:13:13 13 A. Okay.  
 11:13:16 14 Q. The contingency number of \$40,000, how was  
 11:13:18 15 that arrived at, do you know?  
 11:13:21 16 A. Again, it's -- you know, a contingency can  
 11:13:26 17 be anywhere between 10 to 20 percent on a schematic  
 11:13:31 18 repair, so it's closer to 20 percent than 10 percent.  
 11:13:35 19 Again, after the report is issued and the  
 11:13:39 20 contractor estimates are provided, then the  
 11:13:42 21 contingency can be revisited.  
 11:13:49 22 Q. And the remainder of the items 5, 6, and 7,  
 11:13:54 23 those, again, are estimates that you would anticipate  
 11:13:57 24 will be completed sometime within the next two weeks?  
 11:13:58 25 A. Yes, I do.

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11:14:01 1 Q. And the place holders for other will either  
 11:14:05 2 be removed or completed within the next two weeks?  
 11:14:05 3 A. Yes.  
 11:14:14 4 Q. Let's look at Tab 7.  
 11:14:16 5 MR. COUGHLIN: Can we take a break, Tom?  
 11:14:18 6 MR. WALKER: Sure.  
 11:14:19 7 Off the record.  
 11:14:19 8 (Recess taken from 11:14 a.m. to 11:20 a.m.)  
 11:20:13 9 MR. WALKER: We are back on the record.  
 11:20:17 10 Q. (BY MR. WALKER) And we are at Tab 7 entitled  
 11:20:20 11 "Roof" at CM114387.  
 11:20:26 12 With regard to -- well, first of all, let me  
 11:20:29 13 ask: Why are any items with regard to the roof  
 11:20:34 14 included in the damages estimate that you've provided  
 11:20:35 15 to us today?  
 11:20:39 16 A. These are -- this is an estimate to repair  
 11:20:41 17 defective work.  
 11:20:47 18 Q. Are you aware of whether or not Western  
 11:20:51 19 Roofing, the applicator, and Versico have been  
 11:20:54 20 responding to requests for repairs over the last  
 11:20:55 21 several months?  
 11:20:57 22 MR. TROUT: Object to the form.  
 11:21:00 23 THE WITNESS: Well, I know -- excuse me --  
 11:21:04 24 Western was at the site last October when I was on  
 11:21:07 25 site performing some repairs; subsequent to that,

11:22:36 1 Wetherholt for the information that is contained in  
 11:22:39 2 Tab 7 in the back up information?  
 11:22:41 3 A. It's my understanding that testimony will be  
 11:22:47 4 provided by Wetherholt as well as Mr. Weltner for this  
 11:22:47 5 item.  
 11:22:48 6 Q. Anyone else?  
 11:22:56 7 A. Let's see. Probably Laura would provide  
 11:22:59 8 some testimony as to building management over site,  
 11:23:01 9 construction management as well.  
 11:23:07 10 Q. On Tab 4, which consists of two pages, we  
 11:23:11 11 have a number of TBDs, which you have referred to as  
 11:23:12 12 place holders?  
 11:23:13 13 A. Tab 7, you mean? You said, "4."  
 11:23:15 14 Q. I'm sorry. Tab 7.  
 11:23:15 15 A. Yes.  
 11:23:20 16 Q. When do you expect those place holders will  
 11:23:23 17 be resolved, either by elimination or by filling in  
 11:23:24 18 some amount?  
 11:23:27 19 A. I anticipate within two weeks. I believe  
 11:23:30 20 there is a -- there is an additional inspection.  
 11:23:33 21 There is some work scheduled to be performed on the  
 11:23:34 22 roof next week.  
 11:23:35 23 Q. Next week?  
 11:23:35 24 A. Yes.  
 11:23:38 25 Q. And who is going to be performing that work?

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11:21:10 1 there's been leaks. There has been additional  
 11:21:15 2 investigations by Versico as well as by as Wetherholt  
 11:21:20 3 and Associates. Wetherholt not only observed defects  
 11:21:25 4 in the roofing, but defects in the flashing around the  
 11:21:33 5 roofing. I think the lentels -- or lack of lentels  
 11:21:36 6 under the masonry at the roofing is also included in  
 11:21:41 7 this item. Let me check and make sure it's not in the  
 11:21:45 8 masonry. Yeah, I think the lentels might be included  
 11:21:48 9 in this item as well.  
 11:21:49 10 Q. (BY MR. WALKER) Do you know the extent of  
 11:21:51 11 the missing lentels?  
 11:21:55 12 A. I think it occurs at several different  
 11:21:56 13 locations on roof.  
 11:21:58 14 Q. Did you have any personal knowledge with  
 11:22:01 15 respect to the missing lentel issue?  
 11:22:04 16 A. I've seen the area where the lentels are  
 11:22:10 17 missing firsthand, and also I've seen -- they appear  
 11:22:12 18 in reports -- specifically in a report by Wetherholt  
 11:22:12 19 and Associates.  
 11:22:15 20 Q. Do you recall -- how many did you personally  
 11:22:17 21 observe? How many sites?  
 11:22:21 22 A. I think I saw two examples of locations  
 11:22:23 23 where the lentels were missing.  
 11:22:25 24 Q. And with regard to the items on page  
 11:22:32 25 CM114387, Tab 7, are you relying on anyone other than

11:23:42 1 A. I think Western is involved with that work.  
 11:23:47 2 I'm not sure if Versico is out there. And there may  
 11:23:49 3 be another entity as well.  
 11:23:55 4 Q. Do you know who the other entity might be?  
 11:23:55 5 A. Not right now.  
 11:23:59 6 Q. Is it that you just recall, or you haven't  
 11:24:00 7 been informed who the other entity is?  
 11:24:01 8 A. I just can't recall.  
 11:24:03 9 Q. But you do have a specific recollection that  
 11:24:06 10 another entity may be involved in the roof repairs  
 11:24:07 11 next week?  
 11:24:10 12 A. Yes. I mean, there -- not necessarily in  
 11:24:20 13 the repairs, but in observing the repairs.  
 11:24:26 14 Q. The \$100,000 item at four, the estimated  
 11:24:30 15 costs for these items that are listed under four, is  
 11:24:35 16 that -- I don't want to call it a range of magnitude.  
 11:24:37 17 That's simply an estimate?  
 11:24:39 18 A. It's a preliminary estimate, yes.  
 11:24:42 19 Q. Which will be completed in a couple weeks in  
 11:24:42 20 your opinion?  
 11:24:43 21 A. Yes.  
 11:24:47 22 Q. Okay. Let's turn to Tab 8, the water  
 11:24:54 23 feature. And why are these items included in your  
 11:24:55 24 damage estimate?  
 11:25:01 25 A. This item is for the repair of the defective

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11:25:08 1 work at the water features on the property.  
 11:25:11 2 Q. And which -- what defective work are you  
 11:25:12 3 referring to?  
 11:25:21 4 A. Specifically, the defects are -- they've  
 11:25:25 5 been observed by the City, they've been observed by  
 11:25:28 6 Mr. Weltner, and most recently they've been observed  
 11:25:30 7 and documented by Neil Anderson.  
 11:25:34 8 Q. And with respect to your testimony regarding  
 11:25:38 9 damages, will you be relying on anyone to provide you  
 11:25:41 10 with information to support your estimate?  
 11:25:41 11 A. Yes.  
 11:25:47 12 Q. And aside -- you've named Weltner and Neil  
 11:25:48 13 Anderson and who else?  
 11:25:52 14 A. I said the City as well has observed the  
 11:25:56 15 ongoing maintenance and operation problems with the  
 11:25:57 16 water features.  
 11:26:00 17 Q. Do you have any names of the City  
 11:26:04 18 representatives who may provide you with information  
 11:26:06 19 regarding the water feature?  
 11:26:11 20 A. Well, it's conceivable that water feature  
 11:26:17 21 problems will be discussed in testimony by Ted Baird  
 11:26:20 22 as well as by Keith Watts.  
 11:26:25 23 Q. Anyone else that you can think of?  
 11:26:30 24 A. Laura might also testify about it. I think  
 11:26:33 25 the bulk of the testimony though will come from

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11:26:43 1 Mr. Anderson as to the problems and the -- the remedy  
 11:26:46 2 for these problems. He's in the process of finishing  
 11:26:54 3 his project manual, which is a document that will be  
 11:26:58 4 biddable, so the City can get competitive bids to  
 11:26:59 5 perform this work.  
 11:27:02 6 Q. I'm sorry. I didn't catch the name of the  
 11:27:05 7 person preparing the project manual.  
 11:27:07 8 A. Mr. Neil Anderson.  
 11:27:09 9 Q. Okay. Thank you. And all of these numbers  
 11:27:12 10 listed in items -- on Tab 8, items 1 through 10, are  
 11:27:15 11 round numbers; so those are just preliminary  
 11:27:16 12 estimates?  
 11:27:16 13 A. That's correct.  
 11:27:19 14 Q. And there is a couple of place holders. I  
 11:27:21 15 assume that all of these issues will be finally  
 11:27:24 16 resolved within the next couple of weeks?  
 11:27:28 17 A. The project manual is due in two weeks,  
 11:27:32 18 whether the City is able to get competitive bids that  
 11:27:38 19 quickly, it may take a little bit longer than that.  
 11:27:40 20 It's my understanding that three contractors  
 11:27:43 21 have looked at Mr. Anderson's report. They are  
 11:27:49 22 familiar with his work and have provided, you know,  
 11:27:49 23 preliminary estimates.  
 11:27:52 24 Q. Who are the three contractors?  
 11:27:53 25 A. I don't know their names.

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11:27:56 1 Q. Do you know who -- do you know whether or  
 11:28:01 2 not anyone has talked with Alpha Masonry with regard  
 11:28:04 3 to anything having to do with the water feature?  
 11:28:05 4 MR. TROUT: Object to the form.  
 11:28:06 5 THE WITNESS: I do not know.  
 11:28:09 6 Q. (BY MR. WALKER) Do you know -- do you know  
 11:28:14 7 by name any entity that -- any person or entity that  
 11:28:18 8 the City has contacted, aside from those that you  
 11:28:20 9 already mentioned, having to do with the alleged  
 11:28:23 10 defects with the water feature?  
 11:28:24 11 A. I do not.  
 11:28:35 12 Q. Turning to page CM114391 under Tab 9. This  
 11:28:38 13 is entitled "Masonry." And, again, I note that these  
 11:28:42 14 are all round numbers, so they are just preliminary  
 11:28:43 15 estimates; is that correct?  
 11:28:44 16 A. That is correct.  
 11:28:46 17 Q. And where did you get these preliminary  
 11:28:47 18 estimates?  
 11:28:52 19 A. The largest estimate, the masonry repairs,  
 11:28:54 20 is a number provided by Mr. Weltner.  
 11:28:58 21 Q. And do you know what that -- do you know how  
 11:29:01 22 Mr. Weltner arrived at that number?  
 11:29:06 23 A. He prepared an estimate assuming complete  
 11:29:10 24 removal and replacement of the masonry of the entire  
 11:29:11 25 building.

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11:29:13 1 Q. And when you refer to the term "masonry"  
 11:29:16 2 there -- as I understand it, there are at least two  
 11:29:20 3 different masonry products on the building, brick and  
 11:29:21 4 stone; is that your understanding?  
 11:29:21 5 A. Yes.  
 11:29:24 6 Q. And does this million dollars include the  
 11:29:27 7 removal of all of the brick and all of the stone?  
 11:29:30 8 A. I think it's removal and replacement of all  
 11:29:34 9 the stone, and then some repairs -- topical repairs  
 11:29:37 10 and changes to the brick.  
 11:29:39 11 Q. Now, with --  
 11:29:42 12 A. And also the grout throughout the building.  
 11:29:45 13 Q. Okay. With regard to the estimates that  
 11:29:49 14 you -- and the "place holders," to use your term, on  
 11:29:53 15 Tab 9, do you expect those to be resolved within the  
 11:29:54 16 next couple of weeks?  
 11:29:54 17 A. Yes.  
 11:30:01 18 Q. Tab 10, "Plumbing." And, again, we are  
 11:30:05 19 looking at round numbers. And can you tell me where  
 11:30:10 20 you obtained these round numbers?  
 11:30:15 21 A. The work here is for the installation of  
 11:30:21 22 clean outs that appear on the drawings but were not  
 11:30:27 23 installed. And so the repair process is to locate --  
 11:30:30 24 find the locations where the clean out should have  
 11:30:33 25 been installed, install the clean outs, and

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11:30:36 1 unfortunately, that will require some invasive  
 11:30:41 2 investigation and work to wall and ceiling areas  
 11:30:42 3 throughout the building.  
 11:30:45 4 Q. And how is it that you believe there are  
 11:30:48 5 missing clean outs?  
 11:30:51 6 A. I have not conducted an investigation, but  
 11:30:57 7 Mr. Weltner has. Looking at the project documents for  
 11:31:01 8 those clean outs, going physically to the location  
 11:31:04 9 where those clean outs should be located and finding  
 11:31:05 10 that they are not there.  
 11:31:07 11 Q. Is it your understanding that Mr. Weltner  
 11:31:11 12 did a complete inspection of the drain system to  
 11:31:14 13 determine whether or not the clean outs were missing?  
 11:31:15 14 MR. TROUT: Object to the form.  
 11:31:17 15 THE WITNESS: It is my understanding that he  
 11:31:20 16 conducted an investigation. I don't know what you  
 11:31:22 17 mean by "complete investigation." That can mean a lot  
 11:31:25 18 of different things, but he's investigated enough to  
 11:31:28 19 determine that the clean outs shown on the drawings  
 11:31:29 20 were not installed.  
 11:31:31 21 Q. (BY MR. WALKER) Do you know what his  
 11:31:34 22 investigation consisted of?  
 11:31:38 23 A. Not specifically. It is my understanding he  
 11:31:42 24 had a set of as built drawings that he relied upon  
 11:31:46 25 when he walked in various areas of the project.

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11:31:53 1 Q. And do you anticipate that these estimated  
 11:31:55 2 costs and place holders will be completed within the  
 11:31:56 3 next couple of weeks?  
 11:31:57 4 A. Yes.  
 11:32:01 5 Q. Turning to Tab 11, "SW drain." In general,  
 11:32:05 6 can you tell me what this is all about?  
 11:32:28 7 A. Yes. Oh, yes. This is a -- this is  
 11:32:33 8 property damage that occurred at at least one  
 11:32:37 9 location. I think it is in the southwest corner of  
 11:32:40 10 the building, where the cow's tongue portion of the  
 11:32:46 11 roof drain was not properly connected to the pipe  
 11:32:49 12 forming the roof drain. Furthermore, the roof drain  
 11:32:53 13 and the overflow lines were cross connected, so roof  
 11:32:57 14 water from the overflow throughout the drain.  
 11:33:03 15 So instead of the water moving outside the  
 11:33:08 16 building, the cow's tongue is a -- sort of an odd term  
 11:33:11 17 for a device, but basically it is a device to divert  
 11:33:15 18 the water away from the wall instead of into the wall.  
 11:33:18 19 As it flows out of the building it actually entered  
 11:33:22 20 into the wall causing damage inside the wall. And so  
 11:33:29 21 this item includes repair of the damaged wall, as well  
 11:33:34 22 as correcting the cross connection, and essentially  
 11:33:37 23 installing the system the way it should have been  
 11:33:39 24 installed to begin with.  
 11:33:41 25 Q. Do you know whether or not that work has

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11:33:42 1 already been completed?  
 11:33:46 2 A. I think some of the work has. I think the  
 11:33:50 3 cross connections have. I'm not sure all the repairs  
 11:34:08 4 have been conducted or not. Let me check my notes. I  
 11:34:13 5 think some of the work has been installed -- or has  
 11:34:13 6 been performed.  
 11:34:16 7 Q. Is there a reason that you didn't include  
 11:34:21 8 the actual cost of the repairs that have already been  
 11:34:22 9 completed?  
 11:34:26 10 A. No. It just needs to be updated once the --  
 11:34:30 11 with the work that's been prepared -- or excuse me--  
 11:34:31 12 once it is completed.  
 11:34:36 13 Q. So you would anticipate, as in the other  
 11:34:38 14 instances, that this scheduled Tab 11 will be  
 11:34:42 15 completed within the next couple of weeks?  
 11:34:42 16 A. Yes.  
 11:34:48 17 Q. Turning to Tab 12 entitled, "Basement M/E."  
 11:34:52 18 In general, can you tell me what this is all about?  
 11:34:56 19 A. It's my understanding this is two unrelated  
 11:35:02 20 items. One, there is a leak at the basement through a  
 11:35:07 21 pipe penetration. Recently there was an excavation  
 11:35:14 22 outside that wall for a -- I think a sprinkler or some  
 11:35:17 23 sort of break in the pipe outside.  
 11:35:20 24 During the investigation, they observed lack  
 11:35:24 25 of any sort of damp proofing or waterproofing on the

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11:35:28 1 outside face of the concrete wall, or any means to  
 11:35:31 2 properly seal the annular space between the pipe  
 11:35:34 3 running through the wall and the actual sleeve portion  
 11:35:37 4 of the wall, which it explains, I guess, why the wall  
 11:35:38 5 has been leaking.  
 11:35:42 6 The other item has to do with a mechanical  
 11:35:51 7 pad located in the basement over an electrical panel.  
 11:35:54 8 I think it is a fire control panel. And the grout in  
 11:35:59 9 this pad supporting this panel is deteriorating,  
 11:36:04 10 crumbling -- probably improper water cement ratio -- I  
 11:36:06 11 don't know that to be a fact, but that is typically  
 11:36:11 12 what happens when grout fails prematurely.  
 11:36:14 13 So the repair includes -- excuse me -- the  
 11:36:17 14 costs -- the estimate includes repair to the pad, as  
 11:36:25 15 well as work required to properly wearproof the wall  
 11:36:28 16 and fix any damage caused by the leaks.  
 11:36:31 17 Q. Okay. And as with the other items, you  
 11:36:35 18 expect that these cost estimates will be completed and  
 11:36:39 19 the place holders either eliminated or completed  
 11:36:41 20 within the next couple weeks?  
 11:36:42 21 A. Yes, I do.  
 11:36:45 22 Q. Turning to Tab 13, the "Mayor's reception."  
 11:36:47 23 In general, can you tell me what this is all  
 11:36:49 24 about.  
 11:36:54 25 A. This item is the repair of an incomplete

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11:37:03 1 vapor barrier at the ceiling of the barrel vault area,  
 11:37:07 2 the Mayor's reception. It is along the entire wall  
 11:37:12 3 where you have a corrugated type ceiling. Every, I  
 11:37:17 4 don't know, four inches or so there is a visible gap  
 11:37:22 5 where air and -- exterior air can enter the building  
 11:37:24 6 as well as insects.  
 11:37:27 7 I think this item is either under  
 11:37:30 8 construction or has been done at this point. Let me  
 11:37:42 9 check my notes. Oh, the work right now is ongoing.  
 11:37:45 10 Q. And who is doing the work?  
 11:37:49 11 A. I believe Mr. Weltner is.  
 11:37:51 12 Q. So he's the actual contractor doing the  
 11:37:52 13 work?  
 11:37:53 14 A. Yes, I believe so.  
 11:37:59 15 Q. And did Mr. Weltner bid that work?  
 11:37:59 16 A. I don't know.  
 11:38:13 17 Q. And as with the other items, do you expect  
 11:38:17 18 these estimates and place holders on Tab 13 to be  
 11:38:20 19 completed within the next couple of weeks?  
 11:38:20 20 A. Yes.  
 11:38:25 21 Q. Now, turning back to the face page of  
 11:38:40 22 Exhibit No. 325, which is CM114377. It's the one with  
 11:38:43 23 a sticker on it.  
 11:38:45 24 A. I know. I'm just trying to find the one  
 11:38:52 25 with the sticker on it. I'm trying to find the page.

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11:38:55 1 Q. Just out of order.  
 11:38:55 2 A. Yes.  
 11:39:01 3 Q. Now, we've dealt with items 1 through 13,  
 11:39:07 4 but I see on this face page we have items 14, Mike  
 11:39:11 5 Simmonds report; item 15, supporting documentation;  
 11:39:12 6 and 16, letters.  
 11:39:14 7 With regard to item 14, what do you know  
 11:39:15 8 about that?  
 11:39:16 9 A. Well, these are the big items.  
 11:39:22 10 Q. Well, where are they? I don't see any back  
 11:39:22 11 up.  
 11:39:23 12 A. Actually, I don't know. No, I -- in regards  
 11:39:29 13 to 14, 15, and 16, I have not seen anything in regards  
 11:39:30 14 to those items yet.  
 11:39:34 15 Q. So you were being facetious when you said  
 11:39:36 16 these are the big items?  
 11:39:36 17 A. I was. I'm sorry.  
 11:39:39 18 Q. Well, you caused my heart to jump.  
 11:39:39 19 A. Okay. For joy?  
 11:39:40 20 Q. Not really.  
 11:39:40 21 A. Okay.  
 11:39:43 22 MR. WALKER: Let's take a short break, and then I  
 11:39:45 23 think I might be finished.  
 11:43:04 24 (Recess taken from 11:39 a.m. to 11:43 a.m.)  
 11:43:06 25 MR. WALKER: We are back on the record.

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11:43:08 1 Thank you, Mr. Amento, I don't have any  
 11:43:10 2 other questions at this time.  
 11:43:16 3 Mr. Trout, do you have anything?  
 11:43:18 4 MR. TROUT: No.  
 11:43:20 5 MR. WALKER: Thank you. We are off the record.  
 11:43:20 6  
 11:43:20 7 (The deposition concluded at 11:43 a.m.)  
 11:43:20 8 (Signature requested.)  
 11:47:54 9  
 11:47:54 10  
 11:47:54 11  
 11:47:54 12  
 11:47:54 13  
 11:47:54 14  
 11:47:54 15  
 11:47:54 16  
 11:47:54 17  
 11:47:54 18  
 11:47:54 19  
 11:47:54 20  
 11:47:54 21  
 11:47:54 22  
 11:47:54 23  
 11:47:54 24  
 11:47:54 25

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1 VERIFICATION  
 2  
 3 STATE OF \_\_\_\_\_  
 4 ) ss.  
 5 COUNTY OF \_\_\_\_\_  
 6  
 7 I, STEVEN J. AMENTO, being first duly sworn on  
 8 my oath, depose and say:  
 9 That I am the witness named in the foregoing  
 10 deposition taken on the 4th day of November, 2010,  
 11 consisting of pages numbered 1 to 62, inclusive;  
 12 that I have read the said deposition and know the  
 13 contents thereof; that the questions contained  
 14 therein were propounded to me; that the answers to  
 15 said questions were given by me; and that the answers  
 16 as contained therein (or as corrected by me therein)  
 17 are true and correct.  
 18  
 19 Corrections Made: Yes \_\_\_\_\_ No \_\_\_\_\_  
 20  
 21 \_\_\_\_\_  
 22 STEVEN J. AMENTO  
 23  
 24 Subscribed and sworn to before me this \_\_\_\_\_  
 25 day of \_\_\_\_\_, 2010, at \_\_\_\_\_, Idaho.  
 26  
 27 \_\_\_\_\_  
 28 Notary Public for Idaho  
 29 Residing at \_\_\_\_\_, Idaho.  
 30 My Commission Expires: \_\_\_\_\_

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## 1 REPORTER'S CERTIFICATE

2 STATE OF IDAHO )

) ss.

3 COUNTY OF ADA )

4

5 I, JANET FRENCH, Certified Shorthand Reporter and  
6 Notary Public in and for the State of Idaho, do hereby  
7 certify:

8 That prior to being examined, the witness named  
9 in the foregoing deposition was by me duly sworn to  
10 testify to the truth, the whole truth, and nothing but  
11 the truth;

12 That said deposition was taken down by me in  
13 shorthand at the time and place therein named and  
14 thereafter reduced to typewriting under my direction,  
15 and that the foregoing transcript contains a full,  
16 true and verbatim record of said deposition.

17 I further certify that I have no interest in the  
18 event of this action.

19 WITNESS my hand and seal this \_\_\_\_\_ day of  
20 \_\_\_\_\_, 2010.

21

22

*Janet French*

23 JANET FRENCH,  
CSR, RPR and Notary  
Public in and for the  
24 State of Idaho.

25 My Commission Expires: 11-03-2016

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE CITY OF MERIDIAN, an Idaho)  
Municipal Corporation, )  
 ) Case No. CV OC 0907257  
 )  
Plaintiff/Counterdefendant, )  
 )  
vs. )  
 )  
PETRA INCORPORATED, an Idaho )  
corporation, )  
 )  
Defendant/Counterclaimant. )  
\_\_\_\_\_ )

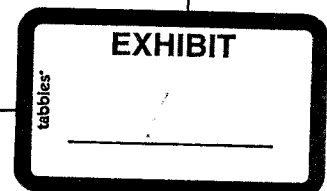
AUDIO-VIDEO 30(b)(6) DEPOSITION OF THEODORE W. BAIRD

November 3, 2010

Boise, Idaho

Janet French, CSR #946, RPR

Associated Reporting Inc.  
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Page 2	Page 4
<p>AUDIO-VIDEO 30(b)(6) DEPOSITION OF THEODORE W. BAIRD</p> <p>RE: IT REMEMBERED that the deposition of THEODORE W. BAIRD was taken by the Defendant/Counterclaimant at the offices of Cosho Humphrey, LLP, located at 800 Park Boulevard, Suite 790, Boise, Idaho, before Associated Reporting, Inc., by Janet French, a Court Reporter and Notary Public in and for the County of Ada, State of Idaho, on Wednesday, the 3rd day of November, 2010, commencing at the hour of 12:01 p.m. in the above-entitled matter.</p> <p>APPEARANCES</p> <p>For the Plaintiff/ TROUT JONES GLEDHILL, FUHRMAN, P.A. Counterdefendant: By: Kim J. Trout, Esq. 225 North 9th Street, Suite 820 Post Office Box 1097 Boise, Idaho 83701 Telephone: (208) 331-1170 Facsimile: (208) 331-1529 ktrout@tdlaw.com</p> <p>For the Defendant/ COSHO HUMPHREY, LLP Counterclaimant: By: Thomas G. Walker, Esq. 800 Park Blvd., Suite 790 Post Office Box 9518 Boise, Idaho 83707-9518 Telephone: (208) 344-7811 Facsimile: (208) 338-3290 twalker@cosholaw.com</p> <p>Also present: Tom Coughlin</p>	<p>PROCEEDINGS</p> <p>11:59:47 1</p> <p>11:59:47 2</p> <p>12:01:04 3 MR. WALKER: Okay. We are on the record. This</p> <p>12:01:11 4 is the 30(b)(6) deposition of the City of Meridian,</p> <p>12:01:14 5 and Theodore W. Baird Jr. is the designated</p> <p>12:01:18 6 representative of the City for purposes of this</p> <p>12:01:19 7 deposition</p> <p>12:01:21 8 And it is being taken on behalf of the</p> <p>12:01:25 9 defendant, Petra Incorporated, in Case No. CV OC</p> <p>12:01:32 10 09-7257, filed by the City of Meridian in the District</p> <p>12:01:35 11 Court for the Fourth Judicial District for the State</p> <p>12:01:37 12 of Idaho in and for Ada County.</p> <p>12:01:38 13 This deposition is being taken on November</p> <p>12:01:43 14 3rd, 2010, commencing at approximately 12:00 o'clock</p> <p>12:01:49 15 noon before Janet French of Associated Reporting, Inc.</p> <p>12:01:52 16 The deposition is being taken at the offices of Cosho</p> <p>12:01:56 17 Humphrey, LLP, at 800 Park Boulevard, Suite 790,</p> <p>12:01:56 18 Boise, Idaho 83712.</p> <p>12:02:00 19 I'm Thomas G. Walker of the Cosho Humphrey</p> <p>12:02:04 20 firm, and I am here representing Petra Incorporated,</p> <p>12:02:07 21 the defendant in this lawsuit, and I'm also the</p> <p>12:02:10 22 operator of the audio/visual equipment.</p> <p>12:02:11 23 This deposition is being taken in accordance</p> <p>12:02:15 24 with the Idaho Rules of Civil Procedure, and there are</p> <p>12:02:18 25 no other stipulations that I'm aware of.</p>
Page 3	Page 5
<p>INDEX</p> <p>EXAMINATION</p> <p>THEODORE W. BAIRD PAGE</p> <p>By: Mr. Walker 5</p> <p>EXHIBITS</p> <p>NO PAGE</p> <p>321. Second Amended Notice of Taking of the Audio-Video Deposition of the City of Meridian, Duces Tecum, Pursuant to I.C.R.P. 30(b)(4) and 30(b)(6) (4 pages) 5</p> <p>322. Excerpts out of the various monthly reports from December 2007 through November 2008 (24 pages) 6</p> <p>323. Complaint for Declaratory Judgment filed by the City of Meridian PETRA96830-63 (34 pages) 13</p> <p>324. First Amended Complaint filed by the City of Meridian (10 pages) 42</p> <p>327. Email string between Keith Watts and Wesley Bettis CM012798-99 (2 pages) 16</p>	<p>12:02:19 1 Do you agree, Mr. Trout?</p> <p>12:02:21 2 MR. TROUT: Well, I don't know of any</p> <p>12:02:23 3 stipulations.</p> <p>12:02:25 4 MR. WALKER: Okay. Kim Trout, counsel for the</p> <p>12:02:30 5 City, is here, as well as Richard Kluckhohn, and Tom</p> <p>12:02:33 6 Coughlin, a consultant for our firm.</p> <p>12:02:33 7 Janet, will you please swear the witness.</p> <p>12:02:33 8</p> <p>12:02:33 9 THEODORE W. BAIRD,</p> <p>12:02:33 10 a witness having been first duly sworn to tell the</p> <p>12:02:33 11 truth, the whole truth, and nothing but the truth,</p> <p>12:02:33 12 testified as follows:</p> <p>12:02:33 13</p> <p>12:02:33 14 (Deposition Exhibit No. 321 marked.)</p> <p>12:02:33 15</p> <p>12:02:33 16 EXAMINATION</p> <p>12:02:33 17 BY MR. WALKER:</p> <p>12:02:49 18 Q. Good afternoon, Mr. Baird.</p> <p>12:02:49 19 A. Good afternoon.</p> <p>12:02:51 20 Q. I'm going to hand you what we have</p> <p>12:02:55 21 previously marked as Deposition Exhibit No. 321, and</p> <p>12:02:58 22 this is the second amended notice of taking of the</p> <p>12:03:02 23 audio/video deposition of the City of Meridian duces</p> <p>12:03:08 24 tecum pursuant to I.R.C.P. 30(b)(4) and 30(b)(6), and it</p> <p>12:03:11 25 deals with claims other than damages.</p>

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12:03:12	1	Have you seen this document before.	12:05:30	1	Q And in line 43 it indicates "occupancy and
12:03:13	2	Mr. Baird?	12:05:32	2	move in "
12:03:14	3	A. Yes, I have.	12:05:33	3	Do you see that at the bottom?
12:03:16	4	Q. And have you brought any documents with you	12:05:34	4	A. I do
12:03:18	5	today in response to the request?	12:05:38	5	Q. And it indicates the duration will be five
12:03:19	6	A. I have not.	12:05:41	6	days commencing on August 29, 2008.
12:03:21	7	Q. And I assume that you have not, because it	12:05:41	7	Do you see is that?
12:03:24	8	is your position that the City has produced all of the	12:05:41	8	A. Yes.
12:03:26	9	documents that would be responsive?	12:05:44	9	Q. And that anticipated finish date is
12:03:26	10	A. That's correct	12:05:46	10	September 4, 2008
12:03:30	11	Q. And as I mentioned during the -- during the	12:05:47	11	Do you see that?
12:03:33	12	introduction, you have been designated by the City as	12:05:47	12	A. I do.
12:03:35	13	the most knowledgeable person regarding the	12:05:49	13	Q. Have you seen this master production
12:03:38	14	allegations set forth in the City's complaint.	12:05:53	14	schedule or other master production schedules produced
12:03:41	15	I'm also going to want to discuss the	12:05:55	15	with each of the monthly reports before?
12:03:45	16	proposed first amended complaint, because it contains	12:05:55	16	A. Yes.
12:03:50	17	some more detail, which I suspect will be important in	12:06:05	17	Q. Let's move on down, please, to -- if we'll
12:03:52	18	order to proceed through this deposition in an orderly	12:06:08	18	just page through these quickly. And I'm going to ask
12:03:53	19	fashion	12:06:11	19	you about the master production schedule for the
12:03:56	20	And basically, I'm going to be asking you	12:06:16	20	monthly report, 2008, and refer you, again, to line 43
12:04:00	21	for facts or proof that the City has in support of its	12:06:22	21	indicating -- and it is dated January 4, 2008.
12:04:04	22	various claims as we have set forth in the notice of	12:06:23	22	Do you see that in the lower left-hand
12:04:05	23	deposition.	12:06:25	23	corner?
12:04:05	24	(Deposition Exhibit No. 322 marked.)	12:06:26	24	MR. TROUT: Which page, Counsel?
12:04:10	25	Q. (BY MR. WALKER) I'm going to hand you what	12:06:31	25	MR. WALKER: It is CM073802.
Page 7			Page 9		
12:04:16	1	we have marked as Deposition Exhibit No. 322, which	12:06:52	1	MR. TROUT: Just a moment, please.
12:04:19	2	I'll represent to you are excerpts out of the various	12:06:54	2	Q. (BY MR. WALKER) Mr. Baird, in the lower
12:04:26	3	monthly reports from December of 2007 through November	12:07:00	3	left-hand corner there is a date, Friday, 1/4/08.
12:04:28	4	of 2008.	12:07:02	4	Do you see that in the lower left-hand
12:04:30	5	A. Before we proceed, could I make a	12:07:02	5	corner?
12:04:31	6	clarification --	12:07:03	6	A. Yes.
12:04:31	7	Q. Sure.	12:07:04	7	Q. And again, line 43 indicates the occupancy
12:04:34	8	A. -- to your statement regarding my purposes	12:07:10	8	and move in, five days, starting on August 29th, 2008.
12:04:35	9	for being here?	12:07:12	9	Do you see that?
12:04:37	10	It is my understanding that I've been	12:07:12	10	A. Yes.
12:04:40	11	designated as the representative regarding non	12:07:17	11	Q. And then if we just move down a couple of
12:04:42	12	economic damages, and that the City has designated	12:07:23	12	pages to the next one, February. And this one is
12:04:46	13	someone else to give a deposition regarding the	12:07:28	13	dated Friday, 2/1/08.
12:04:47	14	economic damages.	12:07:29	14	Do you see that in the lower left-hand
12:04:49	15	Q. That's my understanding, yes.	12:07:29	15	corner?
12:04:53	16	A. I just wanted to make sure we were clear	12:07:30	16	A. Yes.
12:04:54	17	before proceeding.	12:07:36	17	Q. And this is CM073864. And, again, line 43
12:04:58	18	Q. One of the issues I know, Mr. Baird, in this	12:07:39	18	indicates that occupancy and move in, duration of
12:05:02	19	case has been the substantial completion date. And I	12:07:45	19	seven days, starting on Friday, 10/10/08.
12:05:10	20	want to direct your attention to the third page of	12:07:46	20	Do you see that?
12:05:15	21	Exhibit No. 322 -- excuse me -- the second page of	12:07:47	21	A. I do.
12:05:20	22	Exhibit No. 322, which is marked as the "Master	12:07:55	22	Q. Okay. And moving on down to the next one,
12:05:25	23	Production Schedule" dated 12/11/07.	12:07:59	23	which is CM073924.
12:05:26	24	Do you see that?	12:07:59	24	Do you see that?
12:05:27	25	A. Yes, I do.	12:07:59	25	A. Yes.

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12:08:04	1	Q. Dated 2/28/08.	12:10:23	1	Do you see that?
12:08:04	2	A. Yes.	12:10:23	2	A. Yes.
12:08:08	3	Q. Line 45 indicates an occupancy of nine days	12:10:28	3	Q. And line 45, move in duration zero days;
12:08:10	4	commencing on 9/11/07	12:10:34	4	starting Wednesday, 10/15/08, and finished 10/15/08.
12:08:13	5	Do you see that?	12:10:35	5	Do you see that?
12:08:16	6	MR. TROUT: I'm going to object to the form of	12:10:36	6	A. Yes.
12:08:17	7	the question and the questions which have preceded	12:10:38	7	Q. And we can go through the rest of these
12:08:21	8	this related to these documents. The representation,	12:10:41	8	but -- and take your time to look at them, but
12:08:24	9	according to the Counsel, was that these were the	12:10:45	9	essentially they are from and after that last master
12:08:28	10	monthly reports. The documents are incomplete and not	12:10:49	10	schedule. The ones included in Exhibit No. 322
12:08:31	11	consecutively Bates numbered, so these documents have	12:10:55	11	indicate the same move in date of 10/15/08
12:08:36	12	been created in some fashion by the defendant for	12:11:00	12	MR. TROUT: Object to the form of the question.
12:08:43	13	purposes of creating a false impression.	12:11:02	13	Q. (BY MR. WALKER) Now, then if you turn to
12:08:45	14	Q. (BY MR. WALKER) Do you see on -- excuse me.	12:11:08	14	the very last page in Exhibit No. 322, which is marked
12:08:48	15	I should have referred you to line 43, occupancy and	12:11:12	15	CM074519.
12:08:50	16	move in.	12:11:13	16	Do you see that?
12:08:50	17	MR. TROUT: Same objection.	12:11:14	17	A. Uh-huh. Yes.
12:08:53	18	MR. WALKER: And I'll give you a continuing	12:11:16	18	Q. Do you recall seeing the article that
12:08:56	19	objection as we walk through these.	12:11:22	19	appeared in the newspaper of which this is -- the
12:08:57	20	Q. (BY MR. WALKER) These are simply excerpts	12:11:25	20	excerpt is contained on this page?
12:09:01	21	from the monthly reports and you can -- Mr. Baird, if	12:11:26	21	A. Sir, we have two newspapers at the City of
12:09:03	22	you choose to, you can look at the entire report.	12:11:31	22	Meridian. There is the Valley Times as well as the
12:09:06	23	These, by the way, have been produced by the City.	12:11:34	23	Idaho Statesman. I'm not sure which one this was
12:09:07	24	A. I do see line 43.	12:11:35	24	from.
12:09:07	25	Q. Okay.	12:11:37	25	Q. Okay. Do you recall seeing an article in
Page 11			Page 13		
12:09:12	1	A. As well as line 45. There seem to be two	12:11:38	1	the newspaper?
12:09:16	2	different durations; one of five days on line 43, and	12:11:39	2	A. I've seen this clip before.
12:09:19	3	one of nine days on line 45.	12:11:44	3	Q. Okay. Let's move to Exhibit No. 323.
12:09:21	4	Q. Right. And it appears that there is an	12:11:50	4	(Deposition Exhibit No. 323 marked.)
12:09:25	5	error on line 45, because it indicates 9/7/07.	12:12:07	5	Q. (BY MR. WALKER) And take a look at Exhibit
12:09:25	6	Do you see that?	12:12:12	6	No. 323 and let me know whether or not you've seen
12:09:28	7	MR. TROUT: An error by who, Petra?	12:12:16	7	this complaint filed by the City of Meridian before.
12:09:29	8	MR. WALKER: I have no idea.	12:12:19	8	A. Yes, I have seen this document before.
12:09:31	9	THE WITNESS: Yeah. I can't tell you whether it	12:12:26	9	Q. Okay. If you would turn to page 2 of the
12:09:34	10	is an error or not. I just can see -- I can see what	12:12:30	10	complaint, which is marked PETRA96831, and in
12:09:35	11	it says.	12:12:35	11	particular, look at paragraph 6. Paragraph 6 reads,
12:09:36	12	MR. WALKER: Okay. That's fine.	12:12:37	12	"The agreement provides that prior to providing any
12:09:39	13	Q. (BY MR. WALKER) If you flip down a couple	12:12:40	13	services which would be subject to section 7, changes,
12:09:45	14	of pages to CM073988.	12:12:44	14	the construction manager shall notify the City of the
12:09:47	15	A. I have that document in front of me.	12:12:47	15	proposed change and receive the City's approval of the
12:09:51	16	Q. And it's dated 4/3/08.	12:12:48	16	change."
12:09:52	17	Do you see that?	12:12:48	17	Do you see that?
12:09:53	18	A. I do.	12:12:48	18	A. Yes.
12:09:57	19	Q. And line 45 indicates a move in duration of	12:12:50	19	Q. And then in paragraph 7, the complaint
12:10:04	20	zero days with a start date of Thursday, 10/16/08.	12:12:54	20	alleges, "Petra failed to obtain any prior approval of
12:10:05	21	Do you see that?	12:12:56	21	Change Order No. 2."
12:10:09	22	A. I do.	12:12:57	22	Do you see that?
12:10:17	23	Q. Moving on down to CM074057.	12:12:57	23	A. Yes.
12:10:18	24	A. Uh-huh.	12:13:01	24	Q. What facts does the City rely on for the
12:10:23	25	Q. It's dated Friday, 5/2/08.	12:13:04	25	statement that Petra failed to obtain any prior

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12:13:06 1 approval of Change Order No. 2?

12:13:08 2 MR. TROTT: Object to the form of the question to

12:13:13 3 the extent it may call for any form of legal

12:13:13 4 conclusion.

12:13:15 5 You can answer.

12:13:18 6 THE WITNESS: Well, the City did not receive even

12:13:23 7 the advance notice of Change Order No. 2 until, I

12:13:27 8 believe it was November of 2007. And by that time,

12:13:31 9 the work that they are claiming would be subject to

12:13:35 10 Change Order No. 2 had already taken place.

12:13:37 11 Q. (BY MR. WALKER) So it's your testimony that

12:13:43 12 Petra commenced work on the items that are included in

12:13:48 13 Change Order No. 2 prior to November 5th, 2007?

12:13:48 14 A. Yes.

12:13:49 15 MR. TROTT: Object to the form.

12:13:52 16 Q. (BY MR. WALKER) What's the basis for that

12:13:55 17 statement? What facts do you have to support that

12:13:56 18 statement?

12:14:03 19 A. I probably would have to refer to the

12:14:09 20 timecards that they submitted in support of Change

12:14:14 21 Order No. 2. I think those came in October of 2008.

12:14:19 22 And it is my recollection that those timecards went

12:14:22 23 back to a period that began before we received notice

12:14:24 24 of Change Order No. 2.

12:14:27 25 Q. Do you recall your earlier testimony in the

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12:17:31 1 look at the first email from Keith Watts, dated

12:17:36 2 September 5th, 2007, on page CM012799.

12:17:38 3 Do you see that?

12:17:38 4 A. Yes.

12:17:41 5 Q. And it reads -- and this is addressed to

12:17:44 6 Wesley Bettis and Gene Bennett, who, I believe you

12:17:47 7 know were -- Wesley Bettis was an employee of Petra,

12:17:51 8 and Gene Bennett is a current employee of Petra;

12:17:51 9 correct?

12:17:52 10 A. Yes, I'm aware of that.

12:17:56 11 Q. And it also lists Adam Johnson.

12:17:57 12 Who is Adam Johnson?

12:17:59 13 A. He was also an employee of Petra.

12:18:03 14 Q. And it reads, "I got to go to Council last

12:18:06 15 night and talk about the change orders. During

12:18:09 16 discussion, Council agreed to finish the entire

12:18:13 17 building. That is, not leave any areas unfinished.

12:18:13 18 This is to be Petra's official notice of that decision

12:18:16 19 and to move forward accordingly. Council will be

12:18:20 20 receptive to any significant cost savings, but leaving

12:18:23 21 the building unfinished is off the table. I will

12:18:26 22 email you the minutes from the meeting as soon as they

12:18:26 23 are available."

12:18:29 24 Did I read that correctly?

12:18:29 25 A. Yes.

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12:14:31 1 deposition of -- that we conducted -- or the two

12:14:33 2 depositions that we conducted wherein we discussed the

12:14:36 3 timecards and when they -- and what they represented?

12:14:38 4 A. I don't have a specific recollection.

12:14:51 5 Q. Okay.

12:14:51 6 (Deposition Exhibit No. 327 marked.)

12:14:52 7 Q. (BY MR. WALKER) I'm going to take an

12:14:57 8 exhibit out of order and hand you what we've marked as

12:15:16 9 Exhibit No. 327. Take your time -- and this is an

12:15:19 10 email string. It commences on the second page of

12:15:24 11 Exhibit No. 327, which is marked CM012799, and the

12:15:28 12 first page is marked CM012798.

12:15:29 13 Do you see that?

12:15:29 14 A. I do.

12:15:32 15 Q. Have you seen this email string before?

12:15:35 16 A. I'm not copied on it, so I wouldn't have

12:15:41 17 read it at the time that it was sent out. And to be

12:15:44 18 honest with you, I don't recall seeing it, so I would

12:15:48 19 like to go off the record here for a minute and read

12:15:51 20 it if you are going to ask me questions about it.

12:15:54 21 Q. Sure. Yes. Take your time.

12:15:56 22 MR. WALKER: We'll go off the record.

12:17:23 23 (Off the record.)

12:17:26 24 MR. WALKER: Okay. We are back on the record.

12:17:28 25 Q. (BY MR. WALKER) Mr. Baird, I want you to

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12:18:31 1 Q. Have you had a discussion with Keith Watts

12:18:37 2 regarding the official notice that he's giving here to

12:18:42 3 Petra of the decision and to move forward accordingly?

12:18:43 4 A. Not that I recall.

12:18:45 5 MR. TROTT: Object to the form of the question.

12:18:48 6 THE WITNESS: Not that I recall.

12:18:52 7 Q. (BY MR. WALKER) Moving on up to the next

12:18:59 8 email -- well, yeah -- the next email from Wesley

12:19:04 9 Bettis to Keith Watts, also dated September 5th, 2007,

12:19:08 10 and it reads, "Does this mean with or without the wire

12:19:11 11 partitions?"

12:19:14 12 Do you know what that is about?

12:19:16 13 MR. TROTT: Same objection. Object to the form.

12:19:20 14 THE WITNESS: I don't. As I was reading through

12:19:21 15 this, my first question was, what wire partitions?

12:19:21 16 What's a wire partition, and what are they talking

12:19:21 17 about? So I don't know.

12:19:23 18 Q. (BY MR. WALKER) Then Mr. Bettis goes on,

12:19:27 19 "Anything else from the VE sheet or will this be in

12:19:28 20 the minutes?"

12:19:30 21 Did I read that correctly?

12:19:30 22 A. Yes.

12:19:34 23 Q. Do you know what the VE sheet is?

12:19:46 24 A. I don't know what they are talking about.

12:19:49 25 No. It would only be speculation if I were to --

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12:19:52 1 Q Do you recall whether or not you attended  
 12:19:55 2 the City Council meeting on Tuesday, September 4th,  
 12:19:56 3 2007?  
 12:20:00 4 A. I don't remember. There would be a record  
 12:20:01 5 if I was there.  
 12:20:11 6 Q. Then moving up to the next email from Keith  
 12:20:17 7 Watts to Wes Bettis, dated September 5, 2007. "I will  
 12:20:20 8 inquire about the wire partitions, and I need to  
 12:20:23 9 review the minutes as well for further direction. The  
 12:20:25 10 feeling was not to lessen the building by eliminating  
 12:20:29 11 items. Re-engineering would be considered but not so  
 12:20:31 12 much eliminating."  
 12:20:32 13 Did I read that correctly?  
 12:20:33 14 A. Yes.  
 12:20:36 15 Q. Do you recall discussions regarding not  
 12:20:39 16 eliminating items from the building?  
 12:20:41 17 MR. TROUT: Object to the form of the question.  
 12:20:46 18 It is vague and ambiguous.  
 12:20:48 19 THE WITNESS: Separately from this email, as I  
 12:20:51 20 think I've already testified in my previous  
 12:20:54 21 depositions, I was present at the Mayor's Building  
 12:20:58 22 Committee meetings, where items were presented for  
 12:21:02 23 discussion on whether to leave them in or remove them  
 12:21:04 24 from the building.  
 12:21:05 25 Q. (BY MR. WALKER) And what do you recall was

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12:22:34 1 ceilings, but I think we are just a little bit  
 12:22:38 2 pregnant to be making those changes now."  
 12:22:40 3 Did I read that correctly?  
 12:22:40 4 A. You did.  
 12:22:42 5 Q. Do you recall a discussion with regard to  
 12:22:47 6 not doing the access floor HVAC system, but rather  
 12:22:51 7 going to a traditional box car roof top unit?  
 12:22:52 8 MR. TROUT: Object to the form of the question.  
 12:22:55 9 It presumes facts not in evidence.  
 12:22:57 10 THE WITNESS: As I believe that I've testified in  
 12:22:59 11 my prior deposition, I don't specifically recall that  
 12:23:02 12 discussion. I was shown some meeting minutes where it  
 12:23:07 13 appears that it was discussed. That's all that I  
 12:23:08 14 recall.  
 12:23:13 15 Q. (BY MR. WALKER) Okay. Then moving up to  
 12:23:16 16 the next email on the first page of Exhibit No. 327  
 12:23:24 17 from Wes Bettis to Keith Watts, dated September 5th,  
 12:23:29 18 2007, wherein he writes, "Ours is not to question why,  
 12:23:33 19 merely to march on and do or die, right? We will keep  
 12:23:36 20 submitting ideas and let the committee and the council  
 12:23:40 21 address them accordingly. The next major hurdle is  
 12:23:44 22 the plaza and where that comes in price wise."  
 12:23:45 23 Did I read that correctly?  
 12:23:45 24 A. Yes.  
 12:23:48 25 Q. Do you recall any meetings following

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12:21:09 1 the conclusion -- your impression of the conclusion  
 12:21:11 2 reached with regard to that issue?  
 12:21:13 3 MR. TROUT: Object to the form of the question.  
 12:21:15 4 Calls for speculation.  
 12:21:17 5 Q. (BY MR. WALKER) I'm just asking for your  
 12:21:18 6 impression.  
 12:21:20 7 MR. TROUT: Same objection.  
 12:21:23 8 THE WITNESS: My recollection is most of the  
 12:21:27 9 items -- you know, they were talking about leaving in  
 12:21:31 10 or taking out cabinets, things of that nature. It was  
 12:21:34 11 really nothing much of significance, and they picked  
 12:21:37 12 and chose from -- among the list.  
 12:21:40 13 But as Wes Bettis already points out here,  
 12:21:44 14 all the engineering had been done, so they weren't  
 12:21:47 15 talking about value engineering. They were just  
 12:21:50 16 talking about eliminating items.  
 12:21:58 17 Q. (BY MR. WALKER) I want you to refer to the  
 12:22:02 18 next email in the series from Wes Bettis to Keith  
 12:22:08 19 Watts, dated September 5th, and in particular, just  
 12:22:11 20 the last paragraph, which is on the second page of  
 12:22:16 21 Exhibit No. 327, wherein Mr. Bettis writes, "We could  
 12:22:20 22 have saved quite a bit of money by going to a  
 12:22:23 23 transitional design, no access floor, traditional box  
 12:22:29 24 car roof top units, and just meet the minimum ICC  
 12:22:32 25 energy codes, and do all the utilities above the

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12:23:52 1 September 5, 2007, during which Petra submitted  
 12:23:55 2 additional ideas regarding value engineering?  
 12:24:04 3 MR. TROUT: Object to the form of the question.  
 12:24:07 4 THE WITNESS: As I've testified in my previous  
 12:24:11 5 deposition, I don't think what we received, whether it  
 12:24:14 6 was on September 5th, or before or after, I don't  
 12:24:17 7 believe it was value engineering. They may have  
 12:24:22 8 called it value engineering. You might call it value  
 12:24:26 9 engineering, but it was merely a list of items to  
 12:24:29 10 consider deleting from the building; cabinets, things  
 12:24:30 11 of that nature.  
 12:24:31 12 Q. (BY MR. WALKER) And what is your  
 12:24:34 13 understanding of what the term "value engineering"  
 12:24:34 14 means?  
 12:24:36 15 MR. TROUT: Object to the form of the question.  
 12:24:40 16 Calls for speculation. It calls for a legal  
 12:24:41 17 conclusion.  
 12:24:42 18 Q. (BY MR. WALKER) I'm asking for your  
 12:24:43 19 understanding.  
 12:24:47 20 A. Sure. I discussed this at length during my  
 12:24:49 21 first deposition, the original deposition date. I'd  
 12:24:53 22 like to just refer back to that prior testimony, if I  
 12:24:54 23 could.  
 12:24:57 24 Q. Sure. Or if you just want to adopt the  
 12:25:00 25 prior testimony, we can save time and move on.

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12:25:03 1 A. That is exactly what I was talking about  
 12:25:05 2 Rather than rehashing it again today.  
 12:25:07 3 Q. Okay. In the second paragraph of the  
 12:25:11 4 September 5th, 2007, email, Mr. Bettis writes, "Any  
 12:25:15 5 thought on a meeting for the change order request for  
 12:25:19 6 the CM fee on the contaminated soils?"  
 12:25:21 7 Do you remember a meeting that occurred  
 12:25:24 8 after September 5th, 2007, regarding the construction  
 12:25:29 9 manager's fee on the contaminated soil in mediation?  
 12:25:31 10 MR. TROUT: Object to the form of the question  
 12:25:33 11 THE WITNESS: I don't recall attending a meeting  
 12:25:36 12 with regard to the change order request on the  
 12:25:39 13 contaminated soils. That's the change order request  
 12:25:43 14 that we've identified -- was identified in the record  
 12:25:47 15 as Change Order No. 1. It may have been Keith that  
 12:25:49 16 attended that meeting, but I don't recall being at a  
 12:25:50 17 meeting to discuss that.  
 12:25:52 18 Q. (BY MR. WALKER) Mr. Bettis goes on and  
 12:25:56 19 writes, "I have an informal COR" -- which I'll  
 12:25:59 20 represent to you stands for change order request --  
 12:26:01 21 "for you to review on the change and project  
 12:26:06 22 complexity from \$12.2 million, 80,000 square feet, to  
 12:26:11 23 19.1 million, 100,000 square foot project, but thought  
 12:26:13 24 I would hold off formal submittal until the plaza is  
 12:26:14 25 bid and the final base contract value is determined so

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12:27:38 1 follow along with the presentation -- the meeting  
 12:27:42 2 presentation by Petra usually consisted of going  
 12:27:46 3 through the highlights of those documents. So, yes, I  
 12:27:50 4 was at those meetings for the most part, and for the  
 12:27:53 5 meetings that I did not attend, I made sure that I got  
 12:27:55 6 ahold of those reports.  
 12:27:57 7 Q. (BY MR. WALKER) Now, in the last response  
 12:28:01 8 in this string Keith Watts, dated -- from Keith Watts  
 12:28:05 9 to Wes Bettis, dated September 5, 2007, Mr. Watts  
 12:28:09 10 writes, "Good idea on the second one."  
 12:28:10 11 Did I read that correctly?  
 12:28:10 12 A. Yes.  
 12:28:12 13 Q. Do you understand what Mr. Watts is  
 12:28:14 14 referring to in that statement?  
 12:28:16 15 MR. TROUT: Object to the form of the question  
 12:28:19 16 Calls for speculation. May call for some kind of  
 12:28:23 17 legal conclusion. It is also vague and ambiguous.  
 12:28:26 18 THE WITNESS: Yeah, I'd only be speculating what  
 12:28:28 19 he's talking about.  
 12:28:30 20 Q. (BY MR. WALKER) Okay. And then Mr. Watts  
 12:28:33 21 goes on and says, "I will look at Will and Ted's  
 12:28:36 22 schedule to schedule a meeting and get back to you  
 12:28:38 23 today. Thanks, Keith Watts."  
 12:28:39 24 Did I read that correctly?  
 12:28:39 25 A. Yes.

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12:26:18 1 that everything stays current and we do not create an  
 12:26:21 2 image of 'nickel and diming' the project."  
 12:26:23 3 Did I read that correctly?  
 12:26:24 4 A. Yes.  
 12:26:26 5 Q. Did you have any discussion at any time  
 12:26:30 6 after September 5, 2007, with Keith Watts regarding  
 12:26:36 7 the change order request for the change in project  
 12:26:37 8 complexity?  
 12:26:40 9 A. Object to the form of the question. Assumes  
 12:26:44 10 facts not in evidence. May call for a legal  
 12:26:47 11 conclusion. And it calls for speculation.  
 12:26:51 12 THE WITNESS: As I've already testified today, I  
 12:26:54 13 wasn't copied on this email. I don't recall seeing it  
 12:26:59 14 before today. And the first time that I was made  
 12:27:03 15 aware of any pending request for Change Order No. 2  
 12:27:05 16 would have been in the letter from Wes Bettis that was  
 12:27:09 17 delivered in November of '07.  
 12:27:11 18 Q. (BY MR. WALKER) Did you review the monthly  
 12:27:17 19 reports as they were rendered by Petra during the  
 12:27:19 20 course of the project?  
 12:27:20 21 MR. TROUT: Object to the form of the question.  
 12:27:23 22 THE WITNESS: I attended the Mayor's Building  
 12:27:28 23 Committee, where those reports were handed out once a  
 12:27:33 24 month, beginning in December of '07, and I would look  
 12:27:36 25 through those reports during the meeting for -- to

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12:28:42 1 Q. And I'm assuming that Will was Will Berg,  
 12:28:46 2 who was then Meridian City Clerk?  
 12:28:48 3 MR. TROUT: Object to the form of the question.  
 12:28:49 4 THE WITNESS: That would be an assumption.  
 12:28:52 5 Q. (BY MR. WALKER) Were there any other Wills  
 12:28:55 6 that were involved in this process that Mr. Watts  
 12:28:57 7 would be communicating with?  
 12:28:59 8 A. Not that I'm aware of.  
 12:29:01 9 Q. And is it your understanding that the  
 12:29:04 10 reference to Ted is a reference to you?  
 12:29:11 11 A. There were some other Teds involved in the  
 12:29:15 12 project, particularly with some of the prime  
 12:29:18 13 contractors, but they probably weren't involved by  
 12:29:21 14 then, so you could make a reasonable assumption he's  
 12:29:23 15 referring to me, sure.  
 12:29:25 16 Q. And do you recall whether or not you and  
 12:29:28 17 Will and Mr. Watts had a meeting with anyone from  
 12:29:33 18 Petra regarding the items discussed in this email?  
 12:29:35 19 MR. TROUT: Object to the form of the question.  
 12:29:42 20 THE WITNESS: I don't recall meeting in the  
 12:29:47 21 September 2007 time frame. We may have had met after  
 12:29:50 22 we received the letter in November.  
 12:29:53 23 Q. (BY MR. WALKER) Do you recall meeting after  
 12:29:59 24 receiving the letter in November -- and I assume you  
 12:30:01 25 are referring to the November 5th, 2007, letter

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12:30:04 1 regarding Change Order No. 2?  
 12:30:08 2 A. That's correct. The only specific meeting  
 12:30:12 3 that I recall was the meeting that took place in  
 12:30:17 4 October of 2008 where we went over -- where Keith  
 12:30:22 5 Watts, Gene Bennett, and myself -- and maybe Tom  
 12:30:26 6 Coughlin was there -- where we went over the  
 12:30:30 7 substantiation that they provided in support of Change  
 12:30:34 8 Order No. 2. That's the only specific meeting that I  
 12:30:36 9 remember as far as meeting with Petra to discuss  
 12:30:37 10 Change Order No. 2.  
 12:30:39 11 Q. Do you recall meeting with anyone at the  
 12:30:43 12 City of Meridian with regard to Change Order No. 2 at  
 12:30:46 13 any time after September 15, 2007, and before October  
 12:30:49 14 of 2008?  
 12:30:55 15 A. Boy, I'm sure -- we had lots of internal  
 12:30:59 16 meetings. The record contains my -- or some City  
 12:31:01 17 responses to the change order request that I would  
 12:31:05 18 have been involved in drafting, so I'm sure that we  
 12:31:07 19 had meetings regarding them.  
 12:31:11 20 But as far as sitting here today having any  
 12:31:16 21 specific recollection, the one from October 2008 is  
 12:31:18 22 the only one that stands out.  
 12:31:20 23 Q. Do you recall a meeting in August of 2008  
 12:31:25 24 with Gene Bennett and Tom Coughlin and you during  
 12:31:31 25 which you'd discussed the substantiation that Petra

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12:33:02 1 documents since that deposition and putting it in  
 12:33:05 2 context of my review of Change Order No. 1 and Change  
 12:33:09 3 Order No. 2, as I sit here today, I'm thinking that is  
 12:33:13 4 probably factually correct. Because we've made the  
 12:33:16 5 allegation all along they incurred these things once  
 12:33:19 6 they started construction, on or about that date.  
 12:33:23 7 So it would make a lot more sense to have it  
 12:33:26 8 be that July 1st date of 2006.  
 12:33:26 9 Q. (BY MR. WALKER) 2006?  
 12:33:28 10 A. As it is stated there, yes.  
 12:33:30 11 Q. Do you know when the Construction Management  
 12:33:35 12 Agreement between Petra and the City was signed?  
 12:33:41 13 A. August 1st, 2006.  
 12:33:49 14 Q. And do you know when construction commenced?  
 12:33:51 15 A. Not without looking at a schedule.  
 12:34:00 16 Q. Okay. Moving to paragraph 21. "Petra  
 12:34:02 17 breached the agreement by failing to provide the  
 12:34:06 18 services required pursuant to the agreement to the  
 12:34:06 19 City."  
 12:34:09 20 Did I read that correctly?  
 12:34:09 21 A. Yes.  
 12:34:12 22 Q. And what services did Petra fail to provide  
 12:34:16 23 that were required by the agreement, which I'm  
 12:34:17 24 assuming you are referring to the Construction  
 12:34:18 25 Management Agreement.

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12:31:34 1 was submitting to the City of Meridian in support of  
 12:31:36 2 Change Order No. 2?  
 12:31:39 3 A. I only recall one meeting, and I've been  
 12:31:42 4 referring to that as the October 2008 meeting.  
 12:31:45 5 Perhaps I'm confusing it with the documents that were  
 12:31:49 6 received in October of 2008 that may have come out of  
 12:31:53 7 the August -- it could have been August. I haven't  
 12:31:57 8 gone through that calendar to get those exact dates.  
 12:31:59 9 But that's the meeting that I'm referring to.  
 12:32:08 10 Q. Okay. Thank you. If you turn -- I'm back  
 12:32:13 11 to the complaint, which is Exhibit No. 323.  
 12:32:14 12 A. Uh-huh.  
 12:32:17 13 Q. If you turn to the third page of the  
 12:32:23 14 complaint, which is PETRA96832, and paragraph 17. I  
 12:32:27 15 just want to make a clarification. And paragraph 17  
 12:32:32 16 reads, "Petra began incurring costs related to the  
 12:32:36 17 claim of Change Order No. 2 on or about July 1, 2006."  
 12:32:37 18 Do you see that?  
 12:32:38 19 A. Yes, I do.  
 12:32:39 20 Q. Do you recall your testimony during your  
 12:32:42 21 last deposition that that was probably an error and  
 12:32:46 22 the year should be 2007?  
 12:32:48 23 MR. TROUT: Object to the form of the question.  
 12:32:53 24 THE WITNESS: I don't recall my testimony, but I  
 12:32:58 25 could have been confused. Having reviewed other

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12:34:21 1 MR. TROUT: Object to the form of the question to  
 12:34:23 2 the extent it calls for a legal conclusion.  
 12:34:28 3 THE WITNESS: Yeah, the Construction Management  
 12:34:37 4 Agreement was signed on August 1st of 2006, and it did  
 12:34:45 5 contain a number of requirements of Petra.  
 12:34:48 6 The one item that sticks out in my mind was  
 12:34:50 7 their failure to provide the written report of the  
 12:34:55 8 owner's criteria. I think that was in section 4.1 of  
 12:34:57 9 the Construction Management Agreement.  
 12:34:59 10 Q. (BY MR. WALKER) If you want to look at that  
 12:35:04 11 agreement, it is Exhibit No. 2, and the binder is  
 12:35:08 12 right over there so feel free to take a look at it.  
 12:35:10 13 MR. WALKER: Let's go off the record.  
 12:36:04 14 (Off the record.)  
 12:36:06 15 MR. WALKER: We are back on the record.  
 12:36:08 16 Q. (BY MR. WALKER) Mr. Baird, you've had an  
 12:36:11 17 opportunity to take a look at Exhibit No. 2, the  
 12:36:13 18 Construction Management Agreement; is that correct?  
 12:36:13 19 A. Yes.  
 12:36:16 20 Q. And in answer to my previous question  
 12:36:20 21 regarding what services did Petra fail to provide, you  
 12:36:23 22 mentioned the owner's criteria.  
 12:36:26 23 A. I specifically mentioned the failure to  
 12:36:30 24 provide the written report on the owner's criteria,  
 12:36:35 25 Section 4.2 requires that the report shall include

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12:37:26	12	12:41:04	12
12:37:33	13	12:41:07	13
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12:38:28	5	12:41:53	5
12:38:32	6	12:41:56	6
12:38:36	7	12:42:01	7
12:38:39	8	12:42:02	8
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12:38:43	10	12:42:07	10
12:38:45	11	12:42:12	11
12:38:48	12	12:42:13	12
12:38:53	13	12:42:16	13
12:38:59	14	12:42:20	14
12:39:03	15	12:42:20	15
12:39:03	16	12:42:22	16
12:39:07	17	12:42:25	17
12:39:09	18	12:42:28	18
12:39:12	19	12:42:30	19
12:39:17	20	12:42:30	20
12:39:19	21	12:42:32	21
12:39:20	22	12:42:33	22
12:39:23	23	12:42:39	23
12:39:24	24	12:42:41	24
12:39:27	25	12:42:44	25

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12:42:49 1 Mr. Watts regarding his discussion of the general  
 12:42:52 2 conditions with anyone at Petra?  
 12:42:55 3 A. I'd have to go through my email chain during  
 12:42:58 4 that time period. I presume that most of those  
 12:43:01 5 emails, if they are not privileged, that they would  
 12:43:03 6 have been produced.  
 12:43:13 7 Q So is it your testimony that emails between  
 12:43:16 8 you and Mr. Watts would be privileged and would not be  
 12:43:18 9 produced in this case?  
 12:43:18 10 A. No.  
 12:43:21 11 MR. TROUT: Object to the form of the question.  
 12:43:23 12 THE WITNESS: No. I had certain communications  
 12:43:27 13 with Bill Nary in my office. He's the City Attorney,  
 12:43:32 14 and our discussions would be considered attorney work  
 12:43:33 15 product.  
 12:43:36 16 Q (BY MR. WALKER) Okay. Any other services  
 12:43:39 17 that Petra failed to provide as alleged in paragraph  
 12:43:41 18 21 of the complaint?  
 12:44:12 19 A. Yes. I'm looking at section 4.7 of the  
 12:44:15 20 Construction Management Agreement. It is found on  
 12:44:28 21 pages Bates No. CM002697 and CM002698, specifically,  
 12:44:33 22 paragraphs 4.7.9. It states, "Construction manager  
 12:44:36 23 shall carefully observe work of each contractor  
 12:44:41 24 whenever and wherever necessary and shall at a minimum  
 12:44:45 25 observe the work project site no less frequently than

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12:45:58 1 field reports, the daily reports that were prepared by  
 12:46:01 2 Petra with respect to the job during the course of  
 12:46:02 3 construction?  
 12:46:04 4 MR. TROUT: Object to the form of the question to  
 12:46:06 5 the extent it may call for a legal conclusion. It  
 12:46:10 6 contains a reference to claimed facts which are not in  
 12:46:13 7 evidence in this case.  
 12:46:16 8 THE WITNESS: I have not. I'm basing my  
 12:46:20 9 allegation on the fact that we have experts in this  
 12:46:24 10 case who have identified portions of the building that  
 12:46:29 11 don't meet specifications. It was Petra's job to  
 12:46:31 12 observe the work and to protect us from that  
 12:46:32 13 happening.  
 12:46:33 14 Q (BY MR. WALKER) And specifically what items  
 12:46:37 15 are you referring to that did not meet specifications?  
 12:46:39 16 MR. TROUT: Object to the form of the question.  
 12:46:43 17 Outside the scope of this witness's 30(b)(6).  
 12:46:46 18 THE WITNESS: I was going to refer you -- and I  
 12:46:51 19 would refer you to the reports and the depositions  
 12:46:54 20 that you'll be taking of those witnesses.  
 12:46:56 21 Q (BY MR. WALKER) What facts are you relying  
 12:46:59 22 upon to support your testimony that Petra did not  
 12:47:04 23 provide written reports of each -- of such  
 12:47:06 24 observations to the owner?  
 12:47:08 25 MR. TROUT: Object to the form of the question.

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12:44:48 1 each standard work day. The purpose of such  
 12:44:50 2 observation shall be to determine the quality and  
 12:44:53 3 quantity of the work in comparison through  
 12:44:56 4 requirements of the construction contract.  
 12:44:58 5 "In making such observations, the  
 12:45:00 6 construction manager shall protect owner from  
 12:45:03 7 continuing deficient or defective work, from  
 12:45:06 8 continuing unexcused delays in the schedule, and from  
 12:45:08 9 over payment to a contractor.  
 12:45:10 10 "Following each observation, construction  
 12:45:17 11 manager shall submit a written report of such  
 12:45:20 12 observation to owner and architect together with any  
 12:45:23 13 appropriate comments and recommendations" -- "comments  
 12:45:24 14 or recommendations."  
 12:45:27 15 Q Okay. Of those items that you've just  
 12:45:32 16 identified in paragraph 4.7.9, what did Petra fail to  
 12:45:35 17 do that did not meet the requirements of the  
 12:45:36 18 Construction Management Agreement?  
 12:45:39 19 A. They failed to protect the City from  
 12:45:43 20 detective work. They failed to provide written  
 12:45:46 21 reports of any observations that they -- maybe they  
 12:45:49 22 didn't make the observations, so they didn't -- either  
 12:45:53 23 didn't make observations or didn't give us reports on  
 12:45:53 24 their observations.  
 12:45:56 25 Q Let me stop you there. Have you read the

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12:47:12 1 It's been asked and answered.  
 12:47:15 2 THE WITNESS: My allegation is contained more in  
 12:47:18 3 the fact that we have a building that doesn't meet  
 12:47:20 4 specifications and somehow that happened on Petra's  
 12:47:22 5 watch.  
 12:47:24 6 Q (BY MR. WALKER) And I need to know  
 12:47:25 7 specifically, and I have a right to know specifically  
 12:47:29 8 what items you are referring to when you say that the  
 12:47:31 9 items do not meet specifications?  
 12:47:33 10 MR. TROUT: Object to the form of the question.  
 12:47:35 11 It's outside the scope of this witness's 30(b)(6).  
 12:47:39 12 designation. You've already received the expert  
 12:47:42 13 reports in this case. You've already received and had  
 12:47:48 14 an opportunity to depose most, if not all of those  
 12:47:51 15 experts. Counsel. That's not part of this 30(b)(6)  
 12:47:55 16 deposition, and he doesn't have to respond to you.  
 12:47:58 17 This is 30(b)(6) with respect to the  
 12:48:02 18 position that he stated, and that's all. So you don't  
 12:48:04 19 get to inquire beyond that.  
 12:48:07 20 Q (BY MR. WALKER) Mr. Baird, if you'd look  
 12:48:16 21 back at your notice of deposition, which is Exhibit  
 12:48:22 22 No. 321. And you've been designated as the person  
 12:48:24 23 most knowledgeable regarding the allegations by the  
 12:48:30 24 City set forth in paragraphs 4 through 21 of the  
 12:48:31 25 City's complaint, right?

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12:48:33	1	A. That's what it says.	12:50:53	1	and uncivil to interrupt --
12:48:38	2	Q. Okay. And you're -- also more specifically	12:50:55	2	MR. WALKER: It's your objections that are rude
12:48:43	3	you've been indicated as the designated person with --	12:50:58	3	and uncivil and are interrupting these proceedings.
12:48:46	4	most knowledgeable about the facts the City claims	12:50:59	4	MR. TROUT: Well, excuse me, Mr. Walker --
12:48:50	5	support Petra's alleged breach of contract.	12:51:00	5	MR. WALKER: You can object to the form of the
12:48:51	6	Do you see that?	12:51:02	6	question if you want. Your objection is on the
12:48:51	7	A. I do.	12:51:02	7	record. You don't have to make a speaking objection.
12:48:55	8	Q. And do you consider the alleged failure of	12:51:04	8	MR. TROUT: Are you going to allow me to finish
12:48:57	9	Petra to meet the requirements that you've identified	12:51:05	9	or not, sir?
12:49:03	10	in paragraph 4.7.9 as a breach of the contract?	12:51:08	10	MR. WALKER: Finish, please, so we can move on.
12:49:04	11	MR. TROUT: Object to the form of the question,	12:51:09	11	MR. TROUT: Are you going to continue to
12:49:08	12	to the extent that is a question. It's been asked and	12:51:10	12	interrupt me?
12:49:08	13	answered.	12:51:12	13	MR. WALKER: If you continue to make speaking
12:49:09	14	You can answer --	12:51:15	14	objections, yes. I'm entitled to.
12:49:12	15	MR. WALKER: Counsel, I'm going to object to your	12:51:18	15	MR. TROUT: I didn't make a speaking objection.
12:49:14	16	continuous coaching of this witness.	12:51:21	16	MR. WALKER: Are we going to move forward with
12:49:16	17	MR. TROUT: I haven't told him what to say in any	12:51:21	17	this deposition?
12:49:17	18	regard, Counsel.	12:51:24	18	MR. TROUT: I don't know. Are you going to
12:49:19	19	MR. WALKER: You don't need to. You know, you	12:51:28	19	continue to interrupt me uncivilly? Remember, there
12:49:23	20	are skilled in this. So, Mr. Trout, if you'd let us	12:51:31	20	is a rule related to that. And you are the one who is
12:49:27	21	just proceed, we'll be able to wrap this up. If he	12:51:34	21	constantly referring to rules in this case about
12:49:30	22	doesn't have the information, that's all he has to	12:51:34	22	conduct.
12:49:30	23	say. If he has the information, I want to know what	12:51:36	23	Now, I've never interrupted your statements
12:49:30	24	it is.	12:51:39	24	made on the record in this case, and I'm not sure I
12:49:33	25	THE WITNESS: If I can stop you guys, I'd like to	12:51:43	25	understand, Mr. Walker, why it is that you find it
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12:49:37	1	say that maybe we should look at Steve Amento's	12:51:46	1	important to interrupt me when I'm speaking in this
12:49:41	2	subpoena for his deposition where he's been designated	12:51:46	2	case.
12:49:45	3	as our expert, I'm relying on his reports. And if you	12:51:49	3	MR. WALKER: Go ahead and finish your objection,
12:49:49	4	haven't had an opportunity to depose him, I think	12:51:50	4	please.
12:49:51	5	that's coming up this week.	12:51:53	5	MR. TROUT: Are you going to interrupt again?
12:49:53	6	Q. (BY MR. WALKER) I'm deposing Mr. Amento	12:51:55	6	MR. WALKER: I can't answer that until I hear
12:49:57	7	tomorrow regarding damages, and 30(b)(6) deposition.	12:51:56	7	what your objection is.
12:49:59	8	If you are not the person most knowledgeable,	12:52:00	8	MR. TROUT: Well, my objection is that the
12:50:03	9	then just tell me who is, and I'll ask those questions	12:52:02	9	question has been asked and answered, and the --
12:50:05	10	of the person most knowledgeable.	12:52:02	10	MR. WALKER: Okay. Fine.
12:50:07	11	MR. TROUT: With all due respect, Counsel, the	12:52:04	11	MR. TROUT: -- information related to the
12:50:10	12	question has been asked and answered. You've been	12:52:07	12	question has all been provided to you in accordance
12:50:12	13	referred to the expert witness reports and all of the	12:52:09	13	with the Rules of Civil Procedure.
12:50:16	14	information already provided to your client in this	12:52:17	14	MR. WALKER: Fine. Thank you.
12:50:19	15	case regarding exactly how the building fails to meet	12:52:20	15	Q. (BY MR. WALKER) Mr. Baird, do you have any
12:50:22	16	the plan and specification, and the construction under	12:52:24	16	proof that Petra did not observe the work each -- at
12:50:26	17	Petra's watch failed to meet the plans and	12:52:29	17	least each work day?
12:50:31	18	specifications, and Petra's precise responsibility to	12:52:31	18	MR. TROUT: Object to the form of the question to
12:50:34	19	conduct daily inspection to determine whether or not	12:52:34	19	the extent it's vague and ambiguous.
12:50:37	20	the work met plan and specification, and best	12:52:35	20	THE WITNESS: I would have to review any reports
12:50:40	21	construction practices according to the Construction	12:52:39	21	that were prepared by Petra on that -- regarding that
12:50:45	22	Management Plan prepared by Petra --	12:52:41	22	in order to answer that question.
12:50:45	23	MR. WALKER: Mr. Baird -- I mean, Mr. Trout,	12:52:45	23	Q. (BY MR. WALKER) Let's turn to Exhibit
12:50:48	24	would you mind shutting up, please.	12:52:57	24	No. 324.
12:50:50	25	MR. TROUT: Sir, if you are going to be so rude	12:52:58	25	A. What is Exhibit No. 324?

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12:52:58	1 Q. Oh, I guess I better give it to you. I'm	12:55:43	1 Council signed by the Mayor and Council, and I believe
12:52:58	2 sorry.	12:55:48	2 it was in February of 2009. It could be construed as
12:53:03	3 (Deposition Exhibit No. 324 marked.)	12:55:55	3 a denial, although it did contain an invitation for
12:53:06	4 Q. (BY MR. WALKER) It is the proposed first	12:55:59	4 Petra to come in and discuss it further with City
12:53:30	5 amended complaint.	12:56:00	5 Council in executive session.
12:53:34	6 Do you have Exhibit No. 324 in front of you	12:56:03	6 Q. And do you recall what Petra's response was
12:53:35	7 now, sir?	12:56:06	7 to the February 24th, 2009, letter?
12:53:35	8 A. Yes.	12:56:08	8 MR. TROUT: Object to the form.
12:53:37	9 Q. Have you seen this document before?	12:56:08	9 THE WITNESS: I don't recall.
12:53:37	10 A. Yes.	12:56:10	10 Q. (BY MR. WALKER) Do you recall receiving or
12:53:46	11 Q. I'm going to refer you to paragraph 10,	12:56:14	11 seeing a letter dated March 16th, 2009, from me
12:53:48	12 please, on the second page of the first amended	12:56:16	12 requesting mediation?
12:53:55	13 complaint. And, in particular, the last sentence	12:56:24	13 A. I do. Although, I don't know if that was
12:53:58	14 where the complaint alleges Change Order No. 2 was	12:56:28	14 specifically in response to that letter, but we -- the
12:54:00	15 ultimately denied.	12:56:33	15 next step in the process was mediation was requested.
12:54:01	16 Do you see that?	12:56:38	16 Q. What facts does the City have to support its
12:54:01	17 A. Yes.	12:56:43	17 claim that's been made throughout this case that Petra
12:54:03	18 Q. Do you recall the date when the change order	12:56:46	18 misrepresented the maximum price of the contract -- of
12:54:05	19 was ultimately denied?	12:56:47	19 the project?
12:54:08	20 MR. TROUT: By the way I'm going to object to any	12:56:49	20 A. I'd like --
12:54:11	21 questions regarding the proposed first amended	12:56:51	21 MR. TROUT: Object to the form of the question to
12:54:17	22 complaint. Until the Court grants us leave to file	12:56:53	22 the extent it calls for a legal conclusion, and to the
12:54:20	23 it. I don't think it's appropriate for Counsel to	12:56:58	23 extent it is in any way related to the proposed first
12:54:22	24 inquire with respect to the first amended complaint	12:57:02	24 amended complaint
12:54:26	25 I'll allow questions to be asked, but I want	12:57:06	25 THE WITNESS: Again, I do recall discussing this
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12:54:31	1 a standing objection to any questions related to it	12:57:07	1 in my prior deposition.
12:54:33	2 MR. WALKER: Thank you, Counsel. My only purpose	12:57:09	2 Q. (BY MR. WALKER) What document are you
12:54:37	3 is to just use this as an outline and just to move it	12:57:10	3 referring to?
12:54:40	4 along, because it does provide us some structure	12:57:13	4 A. I've picked out Exhibit No. 10, Bates
12:54:42	5 Q. (BY MR. WALKER) And I recognize that this	12:57:18	5 No. CM024235.
12:54:46	6 proposed first amended complaint has not been -- is	12:57:22	6 Q. Okay. And in what -- what point would you
12:54:48	7 not part of the record at this point, so I am just	12:57:26	7 like to make with respect to Exhibit No. 10?
12:54:51	8 using it as a guide.	12:57:28	8 MR. TROUT: Object to the form of the question.
12:54:54	9 Is that acceptable to you, Mr. Baird?	12:57:30	9 THE WITNESS: That document is a project cost
12:54:56	10 MR. TROUT: I'm to object and instruct the	12:57:33	10 summary, and I'm attempting to address your question
12:54:57	11 witness not to answer that question	12:57:38	11 regarding Petra's misrepresentation of the -- was
12:55:00	12 He is here to respond pursuant to the	12:57:43	12 it -- can you repeat your question now that we've gone
12:55:06	13 30(b)(6) notice and not to make any quote unquote new	12:57:44	13 down this road.
12:55:09	14 deals or acceptable arrangements with counsel for the	12:57:46	14 Q. (BY MR. WALKER) What -- well, if you want
12:55:10	15 defendant regarding this matter	12:57:49	15 to just adopt your prior testimony, that's fine with
12:55:12	16 My objection stands to any questions	12:57:49	16 me.
12:55:16	17 regarding to the first amended complaint or proposed	12:57:51	17 A. No. I want to make sure that the question
12:55:19	18 first amended complaint until such time as the Court	12:57:54	18 had to do with Petra's maximum fee.
12:55:23	19 allows it or Counsel, you are willing to stipulate	12:58:22	19 Was that the question?
12:55:25	20 to its filing	12:58:22	20 Q. No. The question was --
12:55:27	21 MR. WALKER: I'm not stipulating to its filing.	12:58:22	21 MR. WALKER: Why don't you read the question
12:55:29	22 Q. (BY MR. WALKER) Mr. Baird, do you recall	12:58:22	22 back, please, Janet.
12:55:33	23 when Change Order No. 2 was ultimately denied?	12:58:22	23 (The question was read back.)
12:55:36	24 A. As I've testified in my prior depositions,	12:58:24	24 MR. TROUT: That's why I am confused.
12:55:39	25 there was a letter that was sent by the Meridian City	12:58:26	25 MR. WALKER: I'm sorry. It was a poor question.

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12:58:26	1 THE WITNESS: Okay.	13:01:33	1 City relying upon for its claims that Petra failed to
12:58:28	2 Q (BY MR. WALKER) What facts does the City	13:01:35	2 define the general conditions?
12:58:32	3 have to support its claim that Petra misrepresented	13:01:38	3 A. I've never seen a definition of the general
12:58:35	4 the maximum price of the project?	13:01:41	4 conditions. I don't think it exists.
12:58:38	5 MR. TROUT: Object to the form of the question.	13:01:47	5 Q. Okay. What facts does the City have to
12:58:41	6 It misstates the claims in the case. It misstates the	13:01:51	6 support its allegation that Petra did not properly
12:58:44	7 prior testimony of the witnesses who have testified in	13:01:55	7 administer the prime contracts?
12:58:46	8 this case. And it calls for a legal conclusion. It's	13:01:58	8 MR. TROUT: Object to the form of the question to
12:58:50	9 also vague and ambiguous.	13:02:03	9 the extent it calls for a legal conclusion.
12:58:53	10 THE WITNESS: Could I have you show me where	13:02:05	10 You can answer.
12:58:56	11 we've made that allegation?	13:02:07	11 THE WITNESS: I'm going to refer back to Exhibit
12:58:58	12 Q (BY MR. WALKER) Well, are you aware -- you	13:02:08	12 No. 2
12:59:01	13 are the designated person most knowledgeable by the	13:02:18	13 Section 4.7.10 which states, "Construction
12:59:05	14 City with respect to the claims that are made in the	13:02:21	14 manager shall reject in writing any work of a
12:59:09	15 complaint. And throughout the case, there has been an	13:02:23	15 contractor that is not in compliance with the
12:59:12	16 allegation that Petra misrepresented the maximum price	13:02:26	16 construction documents unless otherwise directed by
12:59:13	17 of the project.	13:02:28	17 owner in writing."
12:59:15	18 I just want to know what facts the City is	13:02:31	18 If what we ended up with was a building with
12:59:17	19 relying on support that claim.	13:02:34	19 defects, on which I'm relying on my experts to
12:59:19	20 MR. TROUT: Object to the form of the question	13:02:39	20 establish, then there was defective work that was not
12:59:23	21 It misstates the complaint. It misstates the evidence	13:02:42	21 rejected by Petra as it was required under that
12:59:27	22 that has been presented by the City in relationship to	13:02:43	22 paragraph.
12:59:29	23 motions which have been filed with the Court,	13:02:46	23 Q. (BY MR. WALKER) Anything else? In any
12:59:32	24 affidavits filed with the Court. It may call for a	13:02:49	24 other fashion did Petra fail to properly administer
12:59:36	25 legal conclusion. It is all vague and ambiguous.	13:02:51	25 the prime contracts?
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12:59:38	1 THE WITNESS: With regard to Petra's construction	13:02:53	1 MR. TROUT: Object to the form of the question to
12:59:43	2 management fee, as it is a portion of the total	13:02:56	2 the extent it calls for a legal conclusion or ignores
12:59:48	3 project cost, I was referring to Deposition Exhibit	13:02:59	3 facts already in evidence in this case.
12:59:55	4 No. 10 to show that at each estimate, beginning on	13:03:04	4 THE WITNESS: In the Construction Management
12:59:59	5 January 15th of 2007 and continuing on February 12th	13:03:09	5 Plan, there is a form. It's called the notice of
13:00:06	6 of 2007, April 3rd of 2007, and July 12th of 2007,	13:03:12	6 noncompliance, which was a form that was created by
13:00:09	7 Petra represent that their construction management fee	13:03:15	7 Petra in order to advise the parties if something
13:00:14	8 would be \$574,000 at each of those dates. They also	13:03:19	8 wasn't in accordance. I'm not sure any of those were
13:00:17	9 represented that their reimbursables would be 279,812	13:03:22	9 ever used -- or I've never seen any.
13:00:20	10 on each of those dates.	13:03:27	10 To me that was a tool that should have been
13:00:23	11 The alleged misrepresentation comes from the	13:03:30	11 used to prevent the defects that we're alleging.
13:00:27	12 fact that in Jerry's Frank's deposition he testified	13:03:31	12 Q. (BY MR. WALKER) Do you know whether or
13:00:31	13 that he never thought it was a fixed fee contract. He	13:03:36	13 not -- do you know whether the tool was used or not?
13:00:34	14 called it a cost plus a fee.	13:03:38	14 A. I'm not aware that it was ever used.
13:00:38	15 And they've made this representation that	13:03:41	15 Q. And what do you base that statement on?
13:00:41	16 that would be the maximum fee -- construction	13:03:44	16 A. I've never seen one except for the blank
13:00:52	17 management fee, when in fact by July 12th -- well,	13:03:47	17 form that is contained within the Construction
13:00:56	18 what you showed me today is in September of 2007 they	13:03:47	18 Management Plan.
13:01:02	19 claimed -- they did Change Order No. 2, which was an	13:03:50	19 Q. And have you reviewed all of the documents
13:01:05	20 increase in that fee. After standing up in front of	13:03:52	20 that have been produced in this case?
13:01:07	21 the City Council in July of 2007 saying that the	13:03:52	21 A. No, I haven't.
13:01:11	22 highest price that they'll ever pay for the project	13:04:05	22 Q. What facts does the City have to support its
13:01:18	23 was this \$20,457,747 fee. That's a misrepresentation	13:04:09	23 claim that Petra failed to back charge -- that Petra
13:01:20	24 in my opinion.	13:04:12	24 failed to back charge certain contractors for costs
13:01:28	25 Q. (BY MR. WALKER) Okay. What facts is the	13:04:19	25 and rather billed the City for those costs?

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13:04:21	1	MR TROUT Object to the form of the question.	13:06:46	1	there someone else who is more knowledgeable than you
13:04:23	2	THE WITNESS: Can you define what you mean by	13:06:48	2	that might be able to answer the question?
13:04:24	3	back charge?	13:06:51	3	A. I don't know. Maybe we've had some of our
13:04:26	4	Q. (BY MR. WALKER) If there was -- well, do	13:06:55	4	experts look at those and that might be contained in
13:04:30	5	you know -- do you understand what the term "back	13:06:55	5	their reports.
13:04:31	6	charge" means?	13:06:57	6	Q. Do you know though as you sit here today
13:04:33	7	A. I'd only have to make an assumption.	13:07:00	7	whether or not those issues are addressed in any of
13:04:35	8	Q. No, I know. I'm just asking you, do you	13:07:01	8	the expert reports?
13:04:38	9	know what the term "back charge" means in the	13:07:03	9	MR TROUT Object to the form of the question.
13:04:39	10	construction business?	13:07:06	10	THE WITNESS: I haven't fully reviewed those
13:04:42	11	A. No. I have heard it used, but no one has	13:07:06	11	reports.
13:04:44	12	ever defined it to me	13:07:09	12	Q. (BY MR. WALKER) What facts does the City
13:04:46	13	Q. So you can't answer the question based	13:07:12	13	have to support the City's claims that Petra charged
13:04:46	14	upon --	13:07:17	14	the City for its own errors and omissions?
13:04:49	15	A. No. I'd like to answer the question if you	13:07:24	15	A. Again, the Pac-West invoice is the example
13:04:51	16	can help me understand what you mean by back charge.	13:07:26	16	that keeps coming to mind.
13:04:53	17	Q. Well, as I understand it, just for purposes	13:07:29	17	Q. And as you sit here today, you can't recall
13:04:58	18	of moving this along, if there is a defect or a	13:07:30	18	anything else?
13:05:01	19	deficiency that results in an increase in the cost of	13:07:30	19	A. Correct.
13:05:04	20	an item, if that's the fault of a prime contractor, it	13:07:36	20	Q. What facts does the City have to support its
13:05:06	21	would be charged to the prime contractor and not to	13:07:42	21	claim that Petra billed for work which was incomplete?
13:05:07	22	the owner.	13:07:47	22	MR TROUT I'm going to object to the form of
13:05:11	23	Does that definition comport with your	13:07:47	23	the question.
13:05:12	24	understanding of the term?	13:07:48	24	You can answer.
13:05:17	25	MR TROUT Object to the form of the question	13:07:50	25	THE WITNESS: Well, I've already discussed
Page 51			Page 53		
13:05:20	1	THE WITNESS: I'll assume for purposes of the	13:07:54	1	today -- testified regarding the failure to produce
13:05:24	2	question that it does. And refer you to the previous	13:07:56	2	the written report, the owner's criteria, which was
13:05:28	3	discussion that we had in my prior deposition about	13:08:00	3	required by the development strategies phase. And
13:05:34	4	the Pac-West invoices. Those invoices contain some	13:08:05	4	Petra submitted a bill to the City certifying that all
13:05:39	5	notations that Petra gave a wrong level for the	13:08:08	5	of the work required under the development strategies
13:05:45	6	installation of the floor, work had to be redone, and	13:08:11	6	phase was complete when, in fact, it wasn't. So
13:05:49	7	that was charged to the City, where in fact it is the	13:08:16	7	that's an example of them being paid for work that
13:05:53	8	City's position that Petra should have paid that.	13:08:17	8	wasn't done.
13:05:57	9	Now, it is not really a back charge because	13:08:21	9	Q. (BY MR. WALKER) Okay. Any other instances
13:06:00	10	Pac-West got the wrong information from Petra. But	13:08:23	10	occur to you?
13:06:02	11	that's a situation where the City paid for something	13:08:28	11	A. Well, during the construction phase, if they
13:06:04	12	that it shouldn't have.	13:08:31	12	were representing that they were performing all of the
13:06:05	13	Q. (BY MR. WALKER) Anything else?	13:08:35	13	duties required under section 4.7, as I've already
13:06:10	14	A. I'd have to review the documents to answer	13:08:38	14	testified, the City is claiming that they failed to
13:06:16	15	that further.	13:08:40	15	observe the work, they failed to protect against
13:06:18	16	Q. What documents do you need to review to	13:08:45	16	faulty work, so to the extent that they are saying
13:06:19	17	answer that?	13:08:49	17	that they performed that and were paid for it, that
13:06:22	18	A. I'd have to look at the billings	13:08:51	18	would have been paid for work that wasn't done based
13:06:26	19	Q. Would there be somebody else that is more	13:08:54	19	on the defects that are in that building
13:06:29	20	knowledgeable than you with regard to the billing	13:09:00	20	Yeah, those are the examples that come to
13:06:33	21	information contained in the City's files?	13:09:01	21	mind.
13:06:35	22	MR TROUT Object to the form of the question.	13:09:03	22	Q. Any other examples that come to mind?
13:06:38	23	THE WITNESS: They'd have to look at the same	13:09:07	23	A. As far as payment for work not performed by
13:06:40	24	documents that I'd have to look at.	13:09:09	24	Petra; is that your question?
13:06:42	25	Q. (BY MR. WALKER) Well, my question was: Is	13:09:10	25	Q. Yes.

14 (Pages 50 to 53)

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13:09:22 1 A. Those are the examples that I have today.  
 13:09:40 2 Q. Also in -- in our notice of deposition we  
 13:09:43 3 indicate that we are going to be inquiring of you  
 13:09:47 4 regarding the facts that the City claims support  
 13:09:52 5 Petra's alleged unjust enrichment.  
 13:09:54 6 Do you recall reading that in your notice?  
 13:09:54 7 A. I do  
 13:09:57 8 Q. And what facts does the City have to support  
 13:10:01 9 its claim that Petra was somehow unjustly enriched as  
 13:10:04 10 a consequence of its relationship with City?  
 13:10:07 11 A. Well, the two examples I just gave of being  
 13:10:10 12 paid for work that the City alleges wasn't performed,  
 13:10:13 13 that that would be an unjust enrichment.  
 13:10:18 14 In Change Order No. 2 -- no -- Change Order  
 13:10:25 15 No. 1, they billed a straight percentage for general  
 13:10:29 16 conditions resulting from the extra month of the  
 13:10:32 17 project, but they didn't present any bills for  
 13:10:36 18 anything that was procured, so they were paid just a  
 13:10:39 19 flat rate under that change order for items that we  
 13:10:43 20 don't know what they are at this point. Looking back  
 13:10:47 21 on it it -- it was paid by the City, but in my opinion  
 13:10:49 22 looking at that today, I don't think that should have  
 13:10:54 23 been paid. I think that constitutes an unjust  
 13:10:56 24 enrichment. I believe it was in the amount of about  
 13:10:57 25 \$11,000.

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13:18:34 1 (Recess taken from 1:12 p.m. to 1:18 p.m.)  
 13:18:36 2 MR. WALKER: Back on the record  
 13:18:39 3 I don't have any other questions. Thank  
 13:18:41 4 you, Mr. Baird.  
 13:18:41 5 THE WITNESS: Thank you.  
 13:18:44 6 MR. TROUT: Janet, I'd like a portion of the  
 13:18:48 7 transcript that should be pretty easy to find where  
 13:18:53 8 Mr. Walker requested that I shut up. That's going to  
 13:18:59 9 go to the Bar.  
 13:19:01 10 MR. WALKER: Anything else?  
 13:19:01 11 We are off the record.  
 13:19:01 12  
 13:19:01 13 (The deposition concluded at 1:19 p.m.)  
 13:19:01 14 (Signature requested.)  
 13:19:01 15  
 13:19:01 16  
 13:19:01 17  
 13:19:01 18  
 13:19:01 19  
 13:19:01 20  
 13:19:01 21  
 13:19:01 22  
 13:19:01 23  
 13:19:01 24  
 13:19:01 25

Page 55

13:10:58 1 Q. Anything else?  
 13:11:02 2 A. Those are the examples that I have today.  
 13:11:16 3 Q. What facts does the City have to support its  
 13:11:21 4 claim that Petra acted not as a construction manager  
 13:11:26 5 but rather as a general contractor?  
 13:11:31 6 A. Uhm, as I've already mentioned today, the  
 13:11:34 7 organizational chart that is contained in the  
 13:11:41 8 Construction Management Plan, the way that that's  
 13:11:45 9 lined out, that's more of a transitional general  
 13:11:48 10 contractor. As I already testified, it wasn't the  
 13:11:51 11 relationship of the construction manager that we were  
 13:11:56 12 trying to create. That was early on  
 13:11:59 13 And then throughout the project, on various  
 13:12:04 14 documents they refer to themselves as the general  
 13:12:07 15 contractor. They referred to our prime contractors as  
 13:12:13 16 the subs. Those are all, you know, sort of a course  
 13:12:17 17 of conduct that says to us, they really don't get it.  
 13:12:20 18 They don't understand what we are trying to get them  
 13:12:24 19 to do. They are just treating us like a general  
 13:12:26 20 construction, and not -- they are not representing the  
 13:12:28 21 City as the City's construction manager.  
 13:12:29 22 Q. Anything else?  
 13:12:30 23 A. Those are the examples that I have.  
 13:12:59 24 MR. WALKER: Let's go off the record for a second  
 13:13:00 25 and take a little break.

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1 VERIFICATION  
 2  
 3 STATE OF \_\_\_\_\_ )  
 4 ) ss.  
 5 COUNTY OF \_\_\_\_\_ )  
 6  
 7 I, THEODORE W. BAIRD, being first duly sworn on  
 8 my oath, depose and say:  
 9 That I am the witness named in the foregoing  
 10 deposition taken on the 3rd day of November, 2010,  
 11 consisting of pages numbered 1 to 58, inclusive;  
 12 that I have read the said deposition and know the  
 13 contents thereof; that the questions contained  
 14 therein were propounded to me; that the answers to  
 15 said questions were given by me; and that the answers  
 16 as contained therein (or as corrected by me therein)  
 17 are true and correct.  
 18  
 19 Corrections Made: Yes \_\_\_\_\_ No \_\_\_\_\_  
 20  
 21 THEODORE W. BAIRD  
 22  
 23 Subscribed and sworn to before me this \_\_\_\_\_  
 24 day of \_\_\_\_\_, 2010, at \_\_\_\_\_, Idaho.  
 25  
 Notary Public for Idaho  
 Residing at \_\_\_\_\_, Idaho.  
 My Commission Expires: \_\_\_\_\_

15 (Pages 54 to 57)

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## 1 REPORTER'S CERTIFICATE

2 STATE OF IDAHO )

) ss

3 COUNTY OF ADA )

4

5 I, JANET FRENCH, Certified Shorthand Reporter and  
6 Notary Public in and for the State of Idaho, do hereby  
7 certify:

8 That prior to being examined, the witness named  
9 in the foregoing deposition was by me duly sworn to  
10 testify to the truth, the whole truth, and nothing but  
11 the truth.


12 That said deposition was taken down by me in  
13 shorthand at the time and place therein named and  
14 thereafter reduced to typewriting under my direction,  
15 and that the foregoing transcript contains a full,  
16 true and verbatim record of said deposition.

17 I further certify that I have no interest in the  
18 event of this action.

19 WITNESS my hand and seal this \_\_\_\_\_ day of  
20 \_\_\_\_\_, 2010.

21

22

 *Janet French*  
JANET FRENCH.

23 CSR, RPR and Notary

24 Public in and for the

25 State of Idaho.

My Commission Expires: 11-03-2016

16 (Page 58)

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NO. \_\_\_\_\_  
FILED 3:39  
AM \_\_\_\_\_ PM \_\_\_\_\_

NOV 4 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
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Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**PETRA'S RENEWED MOTION IN  
LIMINE TO EXCLUDE TESTIMONY  
AND DOCUMENTS REGARDING  
MERIDIAN'S CLAIMED DAMAGES**

Defendant/Counterclaimant, Petra Incorporated ("Petra"), in the above-entitled matter, by and through its attorneys of record, Cosho Humphrey, LLP, moves this Court pursuant to Rules 7(b), 26(e)(1) and (2) of the Idaho Rules of Civil Procedure, for an order in limine to exclude the admission of testimony and documents regarding Meridian's claimed damages.

This motion is based on the pleadings, records and files in this case and Petra's Memorandum in Support of its Renewed Motion in Limine to Exclude Testimony and Documents Regarding Meridian's Claimed Damages, Affidavit of Thomas G. Walker dated November 9, 2010 and Affidavit of Ginny Sam dated November 9, 2010.

Oral argument is requested on this motion and is currently scheduled November 22, 2010 at 1:30 p.m.

DATED: November 9, 2010.

COSHO HUMPHREY, LLP

By:

  
THOMAS G. WALKER

Attorneys for Petra Incorporated

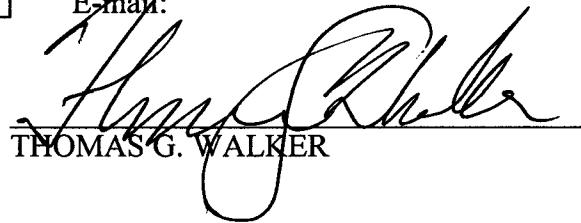


## CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 9th day of November, 2010, a true and correct copy of  
the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

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<input type="checkbox"/>	E-mail:

  
THOMAS G. WALKER

ORIGINAL

NOV 9 2010  
FILED  
P.M. 3:39

NOV 9 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
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Matthew B. Schelstrate (ISB No. 8276)  
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Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

**PETRA'S RENEWED MOTION IN  
LIMINE TO EXCLUDE TESTIMONY  
AND DOCUMENTS BY MERIDIAN'S  
EXPERTS**

Defendant/Counterclaimant, Petra Incorporated ("Petra"), in the above-entitled matter, by and through its attorneys of record, Cosho Humphrey, LLP, moves this Court pursuant to Rules 7(b) and 26(e) of the Idaho Rules of Civil Procedure, for an order in limine to exclude testimony and documents by Meridian's Experts.

This motion is based on the pleadings, records and files in this case and Petra's Memorandum in Support of its Motion in Limine to Exclude Testimony and Documents by Meridian's Experts, Affidavit of Thomas G. Walker dated November 9, 2010 and Affidavit of Ginny Sam, dated November 9, 2010.

Oral argument is requested on this motion and is currently scheduled November 22, 2010 at 1:30 p.m.

DATED: November 9, 2010.

COSHO HUMPHREY, LLP

By: 

THOMAS G. WALKER

Attorneys for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 9th day of November, 2010, a true and correct copy of  
the within and foregoing document was served upon:

Kim J. Trout, Esq.  
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P.O. Box 1097  
Boise, Idaho 83701

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THOMAS G. WALKER

NO. \_\_\_\_\_  
 FILED \_\_\_\_\_  
 A.M. \_\_\_\_\_  
 P.M. \_\_\_\_\_  
 7:39

NOV 4 9 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

**Attorneys for Defendant/Counterclaimant, Petra Incorporated**

**THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

★ ★ ★ ★ ★

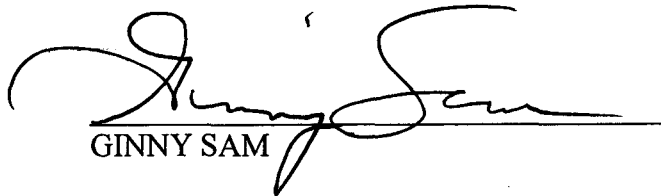
**AFFIDAVIT OF GINNY SAM DATED  
NOVEMBER 9, 2010 IN SUPPORT OF  
PETRA INCORPORATED'S RENEWED  
MOTIONS IN LIMINE**

I, GINNY SAM, being first duly sworn upon oath, depose and state:

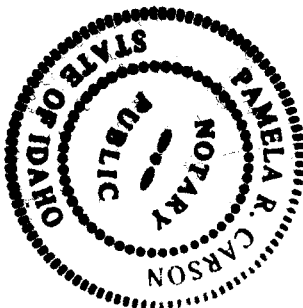
1. I am a paralegal employed by Cosho Humphrey, LLP and I make this affidavit based on my own personal knowledge of the facts set forth herein.

2. I submit this affidavit in support of Petra's Renewed Motion in Limine to Exclude Testimony and Documents regarding Meridian's Claimed Damages and Renewed Motion in Limine to Exclude Testimony and Documents by Meridian's Experts.

3. Attached hereto as **Exhibit A** is a spreadsheet prepared by me from my review of the deposition transcripts in this matter, in which I calculated the number of objections raised by Mr. Trout during the depositions of Steve Amento, taken August 17, 2010 and Ray Wetherholt, taken October 26, 2010 and Theodore Baird taken November 3, 2010.

  
GINNY SAM

SUBSCRIBED AND SWORN to before me this 9<sup>th</sup> day of November, 2010.





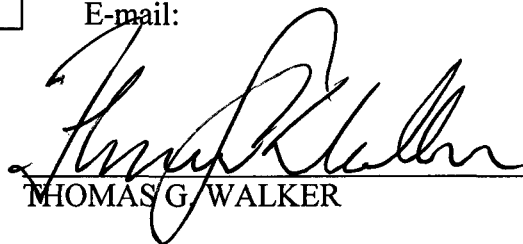
Notary Public for Idaho  
Residing at Eagle, Idaho  
My commission expires: March 31, 2016.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of November, 2010, a true and correct copy of  
the within and foregoing document was served upon:

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Daniel Loras Glynn  
Trout Jones Gledhill Fuhrman, P.A.  
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P.O. Box 1097  
Boise, Idaho 83701

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<input type="checkbox"/>	E-mail:

  
THOMAS G. WALKER

## City of Meridian v. Petra Incorporated

Case No. 09-07257

DEPONENT	DATE	OBJECTION NUMBER	BEGIN TIME	END TIME	TOTAL TIME	TYPE OF OBJECTION
Amento	8/17/2010	1	9:32:15	9:32:25	0:00:10	Objection to Form
Amento	8/17/2010	2	9:45:23	9:45:24	0:00:01	Objection to Form
Amento	8/17/2010	3	10:15:27	10:15:30	0:00:03	Objection to Form
Amento	8/17/2010	4	10:16:29	10:16:31	0:00:02	Objection to Form. Argumentative
Amento	8/17/2010	5	10:18:15	10:18:17	0:00:02	Objection to Form
Amento	8/17/2010	6	10:19:01	10:19:03	0:00:02	Objection to Form
Amento	8/17/2010	7	10:19:21	10:19:23	0:00:02	Objection to Form
Amento	8/17/2010	8	10:19:29	10:19:35	0:00:06	Same objection
Amento	8/17/2010	9	11:31:31	11:31:32	0:00:01	Objection to Form
Amento	8/17/2010	10	11:31:53	11:31:57	0:00:04	Objection to Form
Amento	8/17/2010	11	11:33:34	11:33:37	0:00:03	Objection to Form. May call for legal conclusion
Amento	8/17/2010	12	11:35:17	11:35:21	0:00:04	Objection to Form
Amento	8/17/2010	13	11:36:08	11:36:12	0:00:04	Objection to Form. Is there a question?
Amento	8/17/2010	14	11:36:45	11:36:59	0:00:14	Objection to Form. May call for legal conclusion
Amento	8/17/2010	15	13:01:59	13:02:01	0:00:02	Objection to Form
Amento	8/17/2010	16	13:03:28	13:03:31	0:00:03	Objection to Form
Amento	8/17/2010	17	13:04:30	13:04:34	0:00:04	Objection to Form
Amento	8/17/2010	18	13:05:34	13:05:40	0:00:06	Objection to Form
Amento	8/17/2010	19	13:04:55	13:05:03	0:00:08	Objection to Form
Amento	8/17/2010	20	13:07:47	13:07:52	0:00:05	Objection to Form
Amento	8/17/2010	21	13:08:33	13:08:35	0:00:02	Objection to Form
Amento	8/17/2010	22	13:10:01	13:10:05	0:00:04	Objection to Form
Amento	8/17/2010	23	13:10:38	13:11:02	0:00:24	Objection to Form. May call for legal conclusion. Document speaks for itself
Amento	8/17/2010	24	13:11:11	13:11:15	0:00:04	Same objection to the extent there is a question pending.
Amento	8/17/2010	25	13:11:54	13:11:54	0:00:00	Same objection
Amento	8/17/2010	26	13:13:56	13:13:57	0:00:01	Objection to Form
Amento	8/17/2010	27	13:14:19	13:14:30	0:00:11	Objection to Form. Is there a question?
Amento	8/17/2010	28	13:15:19	13:15:26	0:00:07	Objection to Form
Amento	8/17/2010	29	13:15:36	13:15:39	0:00:03	Objection to Form
Amento	8/17/2010	30	13:16:25	13:17:07	0:00:42	Objection to Form
Amento	8/17/2010	31	13:21:35	13:21:38	0:00:03	Objection to Form
Amento	8/17/2010	32	13:25:53	13:25:56	0:00:03	Objection to Form
Amento	8/17/2010	33	13:29:24	13:29:27	0:00:03	Objection to Form
Amento	8/17/2010	34	13:29:49	13:29:53	0:00:04	Objection to Form
Amento	8/17/2010	35	13:30:15	13:30:23	0:00:08	Objection to Form. May call for a legal conclusion
Amento	8/17/2010	36	13:31:58	13:32:09	0:00:11	Objection to Form
Amento	8/17/2010	37	13:34:02	13:34:05	0:00:03	Objection to Form
Amento	8/17/2010	38	13:35:56	13:35:57	0:00:01	Objection to Form
Amento	8/17/2010	39	13:36:09	13:36:12	0:00:03	Objection to Form



## City of Meridian v. Petra Incorporated

Case No. 09-07257

DEPONENT	DATE	OBJECTION NUMBER	BEGIN TIME	END TIME	TOTAL TIME	TYPE OF OBJECTION
Amento	8/17/2010	40	13:36:18	13:36:20	0:00:02	Same objection
Amento	8/17/2010	41	13:36:40	13:36:45	0:00:05	Objection to Form
Amento	8/17/2010	42	13:38:54	13:38:59	0:00:05	Objection to Form
Amento	8/17/2010	43	13:39:20	13:39:22	0:00:02	Objection to Form
Amento	8/17/2010	44	13:39:31	13:39:32	0:00:01	Objection to Form
Amento	8/17/2010	45	13:45:31	13:45:35	0:00:04	Objection to Form
Amento	8/17/2010	46	13:45:45	13:45:52	0:00:07	Same Objection
Amento	8/17/2010	47	13:45:04	13:46:08	0:01:04	Objection to Form. May call for a legal conclusion
Amento	8/17/2010	48	13:46:50	13:46:55	0:00:05	Objection to Form
Amento	8/17/2010	49	13:45:36	13:47:43	0:02:07	Objection to Form. May call for a legal conclusion
Amento	8/17/2010	50	13:48:14	13:48:16	0:00:02	Objection to Form
Amento	8/17/2010	51	13:50:07	13:50:11	0:00:04	Objection to Form. May call for a legal conclusion
Amento	8/17/2010	52	13:50:34	13:50:37	0:00:03	Objection to Form
Amento	8/17/2010	53	13:57:24	13:57:26	0:00:02	Objection to Form
Amento	8/17/2010	54	13:57:39	13:57:40	0:00:01	Objection to Form
Amento	8/17/2010	55	13:58:16	13:58:16	0:00:00	Objection to Form
Amento	8/17/2010	56	14:00:10	14:00:13	0:00:03	Objection to Form
Amento	8/17/2010	57	14:03:01	14:03:09	0:00:08	Objection to Form
Amento	8/17/2010	58	14:05:03	14:05:08	0:00:05	Objection to Form
Amento	8/17/2010	59	14:06:01	14:06:13	0:00:12	Objection to Form. May call for a legal conclusion. CMA may speak for itself
Amento	8/17/2010	60	14:07:05	14:07:09	0:00:04	Objection to Form. May call for a legal conclusion.
Amento	8/17/2010	61	14:07:44	14:07:56	0:00:12	Objection to Form. May call for a legal conclusion. Document speaks for itself
Amento	8/17/2010	62	14:11:55	14:12:00	0:00:05	Objection to Form
Amento	8/17/2010	63	14:12:51	14:12:54	0:00:03	Same objection
Amento	8/17/2010	64	14:13:24	14:13:29	0:00:05	Same objection
Amento	8/17/2010	65	14:16:48	14:16:50	0:00:02	Objection to Form
Amento	8/17/2010	66	14:17:08	14:17:11	0:00:03	Objection to Form
Amento	8/17/2010	67	14:17:48	14:17:53	0:00:05	Objection to Form
Amento	8/17/2010	68	14:18:18	14:18:19	0:00:01	Objection to Form
Amento	8/17/2010	69	14:19:04	14:19:20	0:00:16	Objection to Form
Amento	8/17/2010	70	14:21:44	14:21:46	0:00:02	Objection to Form
Amento	8/17/2010	71	14:22:00	14:22:01	0:00:01	Objection to Form
Amento	8/17/2010	72	14:22:52	14:22:58	0:00:06	Objection to Form
Amento	8/17/2010	73	14:24:02	14:24:05	0:00:03	Objection to Form
Amento	8/17/2010	74	14:24:16	14:24:21	0:00:05	Objection to Form
Amento	8/17/2010	75	14:24:52	14:25:00	0:00:08	Objection to Form. Argumentative
Amento	8/17/2010	76	14:25:23	14:25:25	0:00:02	Same Objection
<b>Amento Total:</b>					<b>0:09:28</b>	

## City of Meridian v. Petra Incorporated

Case No. 09-07257

DEPONENT	DATE	OBJECTION NUMBER	BEGIN TIME	END TIME	TOTAL TIME	TYPE OF OBJECTION
Wetherholt	10/26/2010	1	9:24:20	9:24:24	0:00:04	Objection to Form
Wetherholt	10/26/2010	2	9:24:59	9:25:08	0:00:09	Objection to Form
Wetherholt	10/26/2010	3	9:39:59	9:40:01	0:00:02	Objection to Form
Wetherholt	10/26/2010	4	10:07:38	10:07:39	0:00:01	Objection to Form
Wetherholt	10/26/2010	5	10:08:18	10:08:24	0:00:06	Objection to Form
Wetherholt	10/26/2010	6	10:11:11	10:11:11	0:00:00	Objection to Form
Wetherholt	10/26/2010	7	10:11:25	10:11:27	0:00:02	Objection to Form
Wetherholt	10/26/2010	8	10:16:35	10:16:38	0:00:03	Objection to Form
Wetherholt	10/26/2010	9	10:17:57	10:17:58	0:00:01	Objection to Form
Wetherholt	10/26/2010	10	10:18:23	10:18:28	0:00:05	Objection to Form
Wetherholt	10/26/2010	11	10:18:34	10:18:36	0:00:02	Same Objection
Wetherholt	10/26/2010	12	10:18:47	10:18:53	0:00:06	Same Objection
Wetherholt	10/26/2010	13	10:19:34	10:19:43	0:00:09	Objection to Form
Wetherholt	10/26/2010	14	10:20:19	10:20:23	0:00:04	Objection to Form
Wetherholt	10/26/2010	15	10:20:39	10:20:41	0:00:02	Objection to Form
Wetherholt	10/26/2010	16	10:25:08	10:25:09	0:00:01	Objection to Form
Wetherholt	10/26/2010	17	10:18:23	10:18:28	0:00:05	Objection to Form
Wetherholt	10/26/2010	18	10:19:34	10:19:43	0:00:09	Objection to Form
Wetherholt	10/26/2010	19	10:20:19	10:20:23	0:00:04	Objection to Form
Wetherholt	10/26/2010	20	10:20:39	10:20:41	0:00:02	Objection to Form
Wetherholt	10/26/2010	21	10:25:08	10:25:09	0:00:01	Objection to Form
Wetherholt	10/26/2010	22	10:26:22	10:26:25	0:00:03	Objection to Form
Wetherholt	10/26/2010	23	10:27:41	10:27:45	0:00:04	Objection to Form
Wetherholt	10/26/2010	24	10:30:09	10:30:13	0:00:04	Objection to Form
Wetherholt	10/26/2010	25	10:31:06	10:31:12	0:00:06	Objection to Form
Wetherholt	10/26/2010	26	10:31:27	10:31:29	0:00:02	Objection to Form
Wetherholt	10/26/2010	27	10:32:45	10:32:49	0:00:04	Objection to Form
Wetherholt	10/26/2010	28	10:33:13	10:33:15	0:00:02	Objection to Form
Wetherholt	10/26/2010	29	10:35:13	10:35:14	0:00:01	Objection to Form
Wetherholt	10/26/2010	30	10:35:49	10:35:52	0:00:03	Objection to Form
Wetherholt	10/26/2010	31	10:36:31	10:36:38	0:00:07	Objection to Form. The question has been asked and answered
Wetherholt	10/26/2010	32	10:40:25	10:40:33	0:00:08	Objection to Form
Wetherholt	10/26/2010	33	10:40:41	10:40:43	0:00:02	Same Objection
Wetherholt	10/26/2010	34	11:00:19	11:00:23	0:00:04	Objection to Form
Wetherholt	10/26/2010	35	11:00:50	11:00:50	0:00:00	Objection to Form
Wetherholt	10/26/2010	36	11:01:53	11:01:57	0:00:04	Objection to Form
Wetherholt	10/26/2010	37	11:04:28	11:04:31	0:00:03	Objection to Form
<b>Wetherholt Total:</b>					<b>0:02:15</b>	

Baird	11/3/2010	1	12:08:16	12:08:45	0:00:29	Objection to Form; Mirepresentation of monthly report
Baird	11/3/2010	2	12:08:50	12:08:53	0:00:03	Same objection
Baird	11/3/2010	3	12:11:00	12:11:02	0:00:02	Objection to form
Baird	11/3/2010	4	12:13:08	12:13:15	0:00:07	Objection to form. May call for legal conclusion
Baird	11/3/2010	5	12:13:45	12:13:52	0:00:07	Objection to form

## City of Meridian v. Petra Incorporated

Case No. 09-07257

DEPONENT	DATE	OBJECTION NUMBER	BEGIN TIME	END TIME	TOTAL TIME	TYPE OF OBJECTION
Baird	11/3/2010	6	12:18:45	12:18:48	0:00:03	Objection to form
Baird	11/3/2010	7	12:19:16	12:19:20	0:00:04	Objection to form
Baird	11/3/2010	8	12:20:41	12:20:48	0:00:07	Objection to form. Vague and ambiguous.
Baird	11/3/2010	9	12:21:13	12:21	0:00:04	Objection to form. Calls for speculation
Baird	11/3/2010	10	12:21:20	12:21:23	0:00:03	Same objection
Baird	11/3/2010	11	12:22:52	12:22:57	0:00:05	Objection to form
Baird	11/3/2010	12	12:24:04	12:24:07	0:00:03	Objection to form
Baird	11/3/2010	13	12:24:36	12:24:45	0:00:09	Objection to form. Calls for speculation; calls for legal conclusion
Baird	11/3/2010	14	12:25:31	12:25:33	0:00:02	Objection to form
Baird	11/3/2010	15	12:26:40	12:26:51	0:00:11	Objection to form; Assumes facts not in evidence; may call for a legal conclusion; calls for speculation
Baird	11/3/2010	16	12:27:20	12:27:23	0:00:03	Objection to form
Baird	11/3/2010	17	12:28:16	12:28:26	0:00:10	Objection to form; calls for speculation, legal conclusion; Vague and ambiguous
Baird	11/3/2010	18	12:28:48	12:28:49	0:00:01	Objection to form
Baird	11/3/2010	19	12:29:35	12:29:42	0:00:07	Objection to form
Baird	11/3/2010	20	12:32:48	12:32:53	0:00:05	Objection to form
Baird	11/3/2010	21	12:34:21	12:34:28	0:00:07	Objection to form; calls for legal conclusion
Baird	11/3/2010	22	12:38:41	12:38:43	0:00:02	Objection to form
Baird	11/3/2010	23	12:39:43	12:40:35	0:00:52	Objection to form
Baird	11/3/2010	24	12:41:33	12:41:35	0:00:02	Objection to form
Baird	11/3/2010	25	12:41:48	12:41:50	0:00:02	Objection to form
Baird	11/3/2010	26	12:42:13	12:42:16	0:00:03	Objection to form
Baird	11/3/2010	27	12:42:32	12:42:33	0:00:01	Objection to form
Baird	11/3/2010	28	12:43:21	12:43:23	0:00:02	Objection to form
Baird	11/3/2010	29	12:46:04	12:46:16	0:00:12	Objection to form; calls for legal conclusion; contains reference to claimed facts which are not in evidence.
Baird	11/3/2010	30	12:46:39	12:46:46	0:00:07	Objection to form; outside the scope of 30(b)(6)
Baird	11/3/2010	31	12:47:08	12:47:12	0:00:04	Objection to form; asked and answered
Baird	11/3/2010	32	12:47:33	12:48:07	0:00:34	Objection to form; outside the scope of 30(b)(6)
Baird	11/3/2010	33	12:49:04	12:49:12	0:00:08	Objection to form; asked and answered
Baird	11/3/2010	34	12:50:07	12:52:20	0:02:13	asked and answered
Baird	11/3/2010	35	12:52:31	12:52:35	0:00:04	Objection to form

City of Meridian v. Petra Incorporated  
Case No. 09-07257

DEPONENT	DATE	OBJECTION NUMBER	BEGIN TIME	END TIME	TOTAL TIME	TYPE OF OBJECTION
Baird	11/3/2010	36	12:54:08	12:54:33	0:00:25	Objection re: First Amended Complaint until court grants leave to file
Baird	11/3/2010	37	12:54:56	12:55:25	0:00:29	Objection - do not answer - re: first amended complaint
Baird	11/3/2010	38	12:56:08	12:56:08	0:00:00	Objection to form
Baird	11/3/2010	39	12:56:51	12:57:06	0:00:15	Objection to form; calls for legal conclusion; related to First Amended Complaint
Baird	11/3/2010	40	12:57:28	12:57:30	0:00:02	Objection to form
Baird	11/3/2010	41	12:58:38	12:58:53	0:00:15	Objection to form; misstates the claims in the case, prior testimony of witnesses; calls for legal conclusion; vague and ambiguous
Baird	11/3/2010	42	12:59:19	12:59:36	0:00:17	Objection to form; misstates evidence; calls for legal conclusion; vague and ambiguous
Baird	11/3/2010	43	13:01:58	13:02:07	0:00:09	Objection to form
Baird	11/3/2010	44				Objection to form; calls for legal conclusions
			13:02:53	13:03:04	0:00:11	
Baird	11/3/2010	45	13:04:21	13:04:23	0:00:02	Objection to form
Baird	11/3/2010	46	13:05:17	13:05:20	0:00:03	Objection to form
Baird	11/3/2010	47	13:06:35	13:06:38	0:00:03	Objection to form
Baird	11/3/2010	48	13:07:03	13:07:06	0:00:03	Objection to form
Baird	11/3/2010	49	13:07:47	13:07:50	0:00:03	Objection to form

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NO. \_\_\_\_\_  
NO. \_\_\_\_\_  
A.M. \_\_\_\_\_  
FILED 3:39 PM

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J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
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Attorneys for Defendant/Counterclaimant, Petra, Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, AN IDAHO  
MUNICIPAL CORPORATION,

Plaintiff/Counterdefendant,

v.

PETRA, INCORPORATED, AN IDAHO  
CORPORATION. ,

Defendant/Counterclaimant.

Case No. CV-OC 09-07257

**MEMORANDUM IN SUPPORT OF  
PETRA'S RENEWED MOTION IN LIMINE  
TO EXCLUDE TESTIMONY AND  
DOCUMENTS BY MERIDIAN'S EXPERTS**

The above-named Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its attorney of record, Thomas G. Walker, of the law firm Cosho Humphrey, LLP submits this memorandum in support of its renewed motion in limine to exclude testimony and documents by the Plaintiff City of Meridian's ("City") experts.

## **1. Introduction**

After months of depositions and discovery requests, Petra has the only been provided with “estimated” damage amounts based on guesswork and speculation. The City’s alleged damages are based upon claims that Petra was professionally negligent in not protecting the City from construction defects. Thus, the City must make its case via expert testimony. The City has recently provided various expert affidavits and reports. Petra has attempted to conduct meaningful depositions of the City’s experts. The City has purportedly supplemented its responses to Petra’s discovery requests. Under Rule 26(b)(4), the City’s experts are limited to the content of their disclosures. The entire universe of expert opinion on damages is now set. The City is limited to its conglomeration of receipts, speculative cost estimates, and foundationless opinion testimony.

First, under the Court’s Order Setting Procedures and Trial, all the City’s expert disclosures must be in compliance with Rule 26(b)(4). At the September 27, 2010 hearing, the Court stated: “To the extent these named experts fail to have their opinions and the basis for their opinions, and so forth, by 45 days before trial, they’ll be excluded.” This is consistent with the case law: “Typically, failure to meet the requirements of Rule 26 results in exclusion of the proffered evidence.” *Radmer v. Ford Motor Co.*, 120 Idaho 86, 89, 813 P.2d 897, 900 (1991).

The City has failed to disclose any expert testimony speaking to causation, an essential element of its case. None of the City’s experts have opined as to how Petra as construction manager caused any of the alleged defects in the Project. No City expert has discloses how he or

she arrived at any of the damage amounts listed by the City. Therefore, Petra seeks an order precluding the City from offering any expert testimony purporting to explain or provide a foundation for the various cost estimates or damage amounts listed in Exhibit 1 to counsel's affidavit.<sup>1</sup>

Second, the City's expert Amento's opinion on liquidated damages is unreliable, lacks a valid methodology or reasoning process, and should be excluded under I.R.E. 702 and 703.

Therefore, Petra requests an order excluding the City's experts from testifying at trial on (1) causation of damages; (2) the methodology, reasoning, or foundation for the damage figures or cost estimates. Any such testimony at trial would constitute undisclosed testimony, a violation of the Court's orders and Rule 26(b)(4). Petra also seeks an order precluding the City's expert Steve Amento from testifying regarding liquidated damages, as his opinion violates I.R.E. 702 and 703.

## **2. Law and Argument**

### **2.1 Amento's opinion on liquidated damages is based on a flawed methodology and should be excluded under I.R.E. 702 and 703.**

The City alleges Petra failed to assess all appropriate liquidated damages during construction and claims damages of \$1,650,000.<sup>2</sup> This is supported by an unfiled affidavit of Steven J. Amento, a supplement to Amento's previously disclosed expert opinions.<sup>3</sup> Amento describes Petra's alleged failure to adjust substantial completion dates for 44 prime contractors; a

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<sup>1</sup> See Affidavit of Thomas G. Walker dated November 9, 2010, ("Walker Affidavit") at Exh. 1.

<sup>2</sup> See Walker Affidavit, at Exh. 2.

<sup>3</sup> *Id.*

claim that Petra inserted into each of these prime contracts a unified substantial completion date of August 28, 2008; and a claim that the architect failed to issue Certificates of Substantial Completion. All of which allegedly hindered the City's ability to assess liquidated damages against the prime contractors with whom it had entered into contracts.

Setting aside the factual and legal defects of the City's position, the focus of this motion is on the City's claim for damages arising from the foregoing conduct attributed to Petra by the City. Amento gives the sum total of his opinion on how the City suffered damages arising from this conduct of Petra and how he arrived at \$1,650,000. Proceeding from the premise that the Project experienced a delay of 75 days,<sup>4</sup> Amento states:

It is possible that each of the 44 Prime Contractors is jointly responsible for the delay; thus the City would assert an aggregate claim of \$1,650,000 (44 contractors x 75 days x \$500/day) for liquidated damages.<sup>5</sup>

Amento goes on to assert that Petra's failure to adjust the substantial completion dates provided the prime contractors with a defense to the City's claims for liquidated damages. Ostensibly, the City, therefore, lost the ability to assess liquidated damages of \$1,650,000. Amento is unsure of how much the City might actually be awarded if it litigated with each of the 44 contractors.

Amento's opinion is unsupported by any reliable reasoning or methodology and is wholly speculative. Under I.R.E. 702 and 703, an expert opinion is only admissible if it is based on valid "reasoning and methodology." *See Coombs v. Curnow*, 148 Idaho 129, \_\_\_, 219 P.3d 453,

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<sup>4</sup> Again, Petra contests this allegation, but sets that aside for purposes of the present Motion. Factually, there were no other contractor caused days of delay other than those caused by Rule Steel, which led to the liquidated damages settlement with Rule Steel.

<sup>5</sup> Walker Affidavit at Exh. 2, at CM114404.



464 (2009). Expert opinion that is speculative or conclusory is inadmissible. *Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1998). “Expert opinion that merely suggests possibilities would only invite conjecture and may be properly excluded.” *Id.* (citing *Elce v. State*, 110 Idaho 361, 716 P.2d 505 (1986)). Courts do not allow a damages expert to simply offer a figure without scrutinizing how the expert arrived at the figure. “Admissibility . . . depends on the experts reasoning and methodology, rather than his or her ultimate conclusion.” *Id.* “The information, theory or methodology upon which the expert’s opinion is based need not be commonly agreed upon by experts in the field, *but it must have sufficient indicia of reliability.*” *City of McCall v. Seubert*, 142 Idaho 580, 585, 130 P.3d 1118, 1123 (2006) (emphasis added).

Under the applicable rules, it is not *what* the expert arrived at, but *how* the expert arrived at it that matters. See *J-U-B Engineers, Inc. v. Security Ins. Co. of Hartford*, 146 Idaho 311, 315, 193 P.3d 858, 862 (2008). In *J-U-B Engineers*, the Supreme Court affirmed the trial court’s ruling that an expert opinion on damages was inadmissible because it was conclusory. In that case, the expert opined that the plaintiff, as a result of the defendant’s actions, had been damaged “in an amount of at least five thousand (\$5,000) and up to four hundred thousand dollars (\$400,000) as a result of increased litigation burdens resultant from reputation damages.” The trial court ruled this opinion on damages inadmissible because the expert offered no basis for his opinion.

This Court is faced here with the same conclusory opinion. Although Amento purports to give a basis for the \$1,650,000 figure, his reasoning and methods in arriving at \$1,650,000 do not withstand scrutiny. Thus, his ultimate damage amount has no reliable foundation. As a matter of construction law, his opinion has no legal basis and is directly contrary to industry practice regarding liquidated damages: liquidated damages are assessed on a per-day basis against the entity responsible for causing the delay. It defies logic to assume a set of circumstances where 44 contractors each caused 75 days of delay. Amento's calculation of "44 contractors x 75 days x \$500/day" is based on an assumption that *all* 44 contractors could be responsible for *all* 75 days of delay. This is an inherently flawed calculation.

Therefore, the figure of \$1,650,000 is pure speculation. Amento theorizes the City would sue each contractor for 75 days of delay for an aggregate of \$1,650,000. The City is free to take that course. But once the contractor(s) who caused the delay is ascertained, the City would be limited to multiplying the days of delay by \$500, *i.e.* 75 x \$500. Therefore, the outside figure under any reasonable view of the circumstances is \$37,500, not \$1,650,000. In any event, it is pure speculation to opine as to what the City might recover in such hypothetical litigation.

In sum, Amento did not arrive at his opinion via a reliable process. The figure of \$1,650,000 has no legal basis and is speculative. Therefore, Amento's opinion fails to comply with I.R.E. 702 and 703 and should be excluded.

**2.2 The City has failed to disclose any expert testimony as to how Petra caused any claimed damages and should be precluded from doing so at trial**

The City has failed to disclose any expert testimony speaking to causation of damages. The City's experts have likewise failed to disclose any methodology, reasoning, or explanation for the various damage amounts. Moreover, with regard to some of the elements of claimed damage, particularly the administration of certain prime contracts, the City's experts do not opine that Petra even breached a contractual duty with regard to any of the change orders, much less caused the City damage. Any testimony at trial as to causation of damages, foundation for the various damage amounts, and any further opinion as to how Petra allegedly breached the Construction Management Agreement, would exceed the scope of the City's current expert witness disclosures, and violate the Court's orders.

After denying Petra's original Motion to Exclude Expert Testimony, the Court ruled that "[t]o the extent that any of these named experts fail to have their opinions and the basis of their opinions, and so forth, by 45 days before trial, they'll be excluded."<sup>6</sup> Under this ruling, the Court's Order Setting Proceedings and Trial, and I.R.C.P. 26(b)(4), the City is precluded from offering undisclosed opinions at trial. Since any opinion as to causation of damages and any opinion as to the basis for the damage amounts has yet to be disclosed, Petra requests an order excluding any expert testimony on these subjects at trial.

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<sup>6</sup> See Walker Affidavit at Exh. 5., p. 53.

As documented below, the City's claimed damages are unsupported by expert testimony, without which the City's damages cannot be proven. It is insufficient in a breach of contract and professional negligence case to simply claim damages without providing a causal link, which must be in the form of expert testimony. This is not a case of strict liability. The City has merely juxtaposed baseless "cost estimates" with various contract terms and opinions as to Petra's various duties under the Construction Management Agreement.

**2.2.1 Petra did not improperly approve change orders or charges to the City.**

The City alleges Petra improperly approved certain change orders or charges to the City. The City lists 14 change orders or charges to the City, corresponding dollar amounts, adds up the amounts, and lists \$97,917.04 as a total amount of claimed damages. The City provides no explanation, much less an expert opinion, as to how Petra as construction manager fell below the applicable standard of care in approving each of these change orders or charges. Without expert testimony, all we have is a disparate set of documents. Therefore, the City should be precluded from offering at trial any expert testimony on causation and any expert testimony purporting to provide a basis for these claimed damages.

**2.2.2 The closeout warranties and extra materials were provided to the City.**

Next, the City submits a list of various closeout warranties and extra materials. No dollar amounts are listed. The only support for this particular set of apparent damage allegations consists of 76 pages of documents. The City has not provided any expert testimony as to how

Petra as construction manager fell below the standard of care with regard to the closeout warranties and extra materials. Without expert testimony, all we have are various lists and seemingly unrelated documents.

Thus, Petra requests an order excluding any expert testimony on this topic at trial. Additionally, as addressed in Petra's *Renewed Motion to Exclude Evidence of Damages*, the City should be precluded from introducing any dollar amounts at trial to correspond to the list. The deadline has passed for the City to disclose its evidence of claimed damages.

### **2.2.3 The Sewage Incident**

Next, the City claims as damages costs arising from cleaning up an overflow of sewage in the first floor women's restroom. This incident occurred during the Spring of 2010, some 18 months after the City occupied the new City Hall building. The City lists \$43,790 in damages. As support for the apparent allegation that Petra is responsible for the costs, the City provides 510 pages of documents, including invoices for the cleanup from the incident, the insurance company reimbursement and several hundred invoices, statements, and other unrelated information.

The City offers no expert testimony as to (1) how Petra's performance as construction manager fell below the applicable standard with respect to this sewage overflow incident and (2) how Petra's performance, if deficient, caused any of the claimed \$43,790 in damages. Without expert testimony, all we have are invoices, letters, and other documents. Therefore, the City

should be precluded from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.

**2.2.4 The City's claim of defects in the plumbing are not supported by admissible evidence.**

The City alleges defects in the plumbing system in the amount of \$66,500, including \$31,500 of fees and contingencies. This claim is apparently based on allegedly missing sewer line cleanouts. In fact, the close out of the plumbing punch lists and the City Plumbing Inspector's acceptance of the sewer lines as being code compliant irrefutably rebuts any belated claim by the City regarding sewer line deficiencies. Notably, the City provides no explanation as to how Petra's performance caused any of these alleged defects. The only support for this alleged damage is a series of drawings. Petra requests an order precluding the City from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.

**2.2.5 Defects in the southwest roof drain, if any, are not attributable to Petra's performance of its duties under the Construction Management Agreement.**

With regard to the southwest roof drain, the City claims damages in the amount of \$49,000, including \$29,000 in contingencies. There is no expert opinion as to how Petra's performance, or lack thereof, caused any of these alleged defects. In fact, there is no expert opinion at all, just a series of photos. Petra requests an order precluding the City from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.

**2.2.6 Defects in the basement mechanical and electrical, if any, are not attributable to Petra's performance of its duties under the Construction Management Agreement.**

With regard to the basement mechanical and electrical, the City alleges damages of \$114,000, with \$39,000 in fees and contingencies. There is no expert opinion as to how Petra's acts or omissions caused any of these alleged defects. Petra requests an order precluding the City from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.

**2.2.7 Alleged problems with the Mayor's reception area are not attributable to anything that Petra did or failed to do.**

With regard to the Mayor's reception area, the City alleges damages in the amount of \$44,000, including \$26,500 in fees and contingencies. There is no expert testimony as to how Petra's performance, or lack thereof caused any of these alleged defects. Petra requests an order precluding the City from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.

**2.2.8 There is no proof of damage to support an allegation that Petra failed to provide a report on the owner's criteria.**

Lastly, the City lists the lack of a report on the owner's criteria as an element of claimed damages. The City provides no expert testimony regarding anything that Petra did or failed to do as the construction manager with regard to the owner's criteria. Petra requests an order precluding the City from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.

**2.2.9 Alleged defects in the HVAC, if any, are not attributable to Petra's performance of its duties under the Construction Management Agreement**

The City lists \$382,500 in damages allegedly stemming from occupancy comfort issues and chiller vibrations related to the HVAC system. The City's expert Tim Petsche lists various alleged defects with the system. Petsche does not state that Petra caused any of these problems by failing to discharge a duty under the Construction Management Agreement. The City has not disclosed any expert testimony regarding how Petra's performance fell below industry standards and caused these defects in the HVAC system. This is not just a technical deficiency. There are a multitude of reasons the HVAC system may have problems, including being improperly maintained and operated by untrained City personnel. The Petsche report was prepared well over a year after the City occupied the City Hall building. Petra requests an order precluding the City from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.

**2.2.10 Alleged defects in the roof, if any, are not attributable to Petra's performance of its duties under the Construction Management Agreement**

The City alleges \$160,000 in damage to the City Hall roof. The City has disclosed an expert report by Wetherholt & Associates that outlines various issues with the roof. This report is based on site inspections conducted on January 14, 2010 and July 23, 2010.

Much like the Petsche report, the Wetherholt report does not address how Petra breached any duty as a construction manager or how any failure on the part of Petra led to the alleged



problems with the roof. Considering the length of time between when Wetherholt conducted his study and the City's occupancy date of October 15, 2008, it is more likely than not that the alleged damage was caused by City personnel or other third persons after the roof punch list was closed. Petra requests an order precluding the City from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.

**2.2.11 Alleged defects in the water features, if any, are not attributable to Petra's performance of its duties under the Construction Management Agreement**

The City alleges \$462,500 in damages related to the water features. The City has disclosed a report by Anderson & Associates. This report does not address how Petra breached any duty as a construction manager or how any failure on the part of Petra led to the alleged problems with the water features. The report in fact expressly refrains from offering any opinion as to who may have caused any of the alleged defects. Petra requests an order precluding the City from offering at trial any expert testimony on causation or expert testimony purporting to provide a basis for these claimed damages.

In sum, the City's disclosures with regard to its damage claims are unsupported by expert testimony as to how Petra's performance or failure to perform a required duty caused any damage to the City. In light of the Court's rulings and Rule 26, Petra respectfully requests an order precluding any expert testimony as to causation and any expert testimony attempting to explain or provide a foundation for the above damage claims. This would be surprise testimony

and would result in prejudice to Petra due to the inability to adequately prepare a rebuttal of the City's testimony.

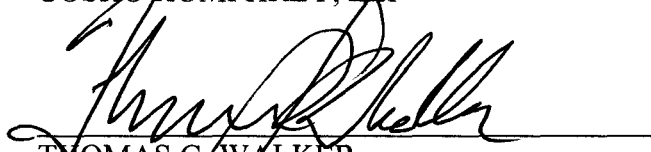
### **3. Conclusion**

In conclusion, the City belatedly submitted the entirety of its disclosure on damages. However, even these tardy disclosures fail to support its damage claims. There is little, if any, expert opinion as to how Petra caused any of the alleged damage. The admission of any such opinions at trial would constitute surprise testimony in violation of the rules. Furthermore, Amento's opinion is the product of an unreliable and flawed methodology and is inadmissible under I.R.E. 702 and 703.

Therefore, Petra seeks an order (1) excluding the City's experts from testifying at trial on causation of damages; (2) the methodology, reasoning, or foundation for the damage amounts or "cost estimates;" and (3) the claimed damage amounts. Petra also seeks an order excluding Amento from offering his opinion on liquidated damages.

DATED: November 9, 2010.

COSH HUMPHREY, LLP



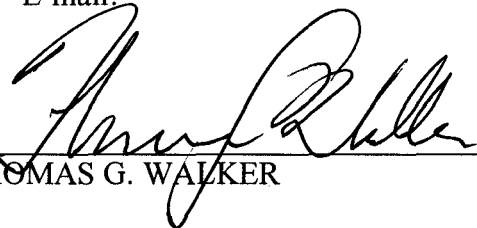
THOMAS G. WALKER  
Attorneys for Petra Incorporated

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 9<sup>th</sup> day of November, 2010, a true and correct copy of  
the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

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☒ Hand Delivery  
☐ Overnight Courier  
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THOMAS G. WALKER

ORIGINAL

NO. \_\_\_\_\_  
NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 3:39

NOV 4 9 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
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[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE OF HEARING

PLEASE TAKE NOTICE, That the undersigned, attorneys for Petra Incorporated, ("Petra"), the Defendant/Counterclaimant in the above-entitled matter, will bring before the Honorable Ronald J. Wilper of the above-entitled Court, for hearing at the Ada County Courthouse, 200 West Front Street, Boise, Idaho 83702, on **Monday**, the **22nd** day of

**November, 2010**, at the hour of **1:30 p.m.** or as soon thereafter as counsel can be heard,  
Defendant/Counterclaimant, Petra Incorporated's Renewed Motion in Limine to Exclude  
Testimony and Documents Regarding Meridian's Claimed Damages and Petra Incorporated's  
Renewed Motion in Limine to Exclude Testimony and Documents by Meridian's Experts.

DATED: November 9, 2010.

**COSHO HUMPHREY, LLP**

By: 

THOMAS G. WALKER

Attorneys for Defendant/Counterclaimant, Petra  
Incorporated

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 9th day of November, 2010, a true and correct copy of  
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Kim J. Trout, Esq.  
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225 North 9<sup>th</sup> Street, Suite 820  
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Boise, Idaho 83701

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☐ E-mail:

  
THOMAS G. WALKER

ORIGINAL

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A.M.  
FILED  
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J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB 5509)  
Mackenzie Whatcott (ISB No. 6774)  
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Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

PETRA'S MOTION TO SHORTEN  
TIME FOR HEARING

The above-named Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its attorney of record, Thomas G. Walker, of the law firm Cosho Humphrey, LLP moves this Court pursuant to Rule 7(b)(3) of the Idaho Rule of Civil Procedure for an Order shortening the required period for hearing Petra's Renewed Motion in Motion in Limine to Exclude

Testimony and Documents regarding Meridian's Claimed Damages and Renewed Motion in Limine to Exclude Testimony and Documents by Meridian's Experts.

This motion is made because there is insufficient time to give the notice required by Rule 7(b)(3) prior to the hearing scheduled on these motions for Monday, November 22, 2010 at 1:30 p.m.

DATED: November 9, 2010.

COSHO HUMPHREY, LLP

By: 

THOMAS G. WALKER

Attorneys for Defendants/Counterclaimant

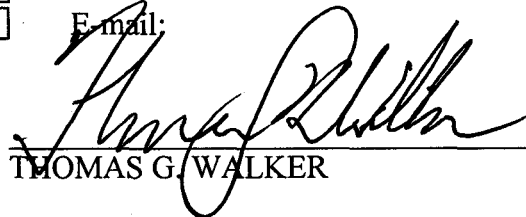


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THOMAS G. WALKER

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NOV 09 2010

J. DAVID NAVARRO, Clerk  
By J. RANDALL  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
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[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho Municipal  
Corporation,

Plaintiff/Counterdefendant,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant/Counterclaimant.

Case No. CV OC 0907257

NOTICE OF HEARING

PLEASE TAKE NOTICE, That the undersigned, attorneys for Petra Incorporated, ("Petra"), the Defendant/Counterclaimant in the above-entitled matter, will bring before the Honorable Ronald J. Wilper of the above-entitled Court, for hearing at the Ada County Courthouse, 200 West Front Street, Boise, Idaho 83702, on **Monday**, the **22nd** day of

**November, 2010**, at the hour of **1:30 p.m.** or as soon thereafter as counsel can be heard,  
Defendant/Counterclaimant, Petra Incorporated's Motion to Shorten Time for Hearing.

DATED: November 9, 2010.

**COSHO HUMPHREY, LLP**

By: 

THOMAS G. WALKER

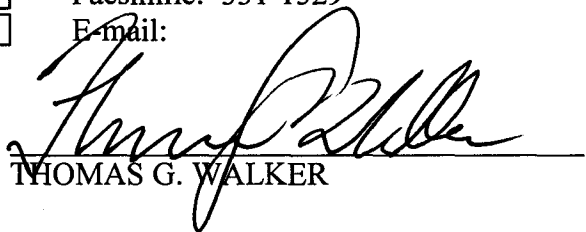
Attorneys for Defendant/Counterclaimant, Petra  
Incorporated

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Kim J. Trout, Esq.  
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Boise, Idaho 83701

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THOMAS G. WALKER

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NOV 12 2010

**KIM J. TROUT, ISB #2468**  
**DANIEL LORAS GLYNN, ISB #5113**

**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A. DAVID NAVARRO, C.**  
225 North 9th Street, Suite 820  
P.O. Box 1097  
Boise, ID 83701  
Telephone: (208) 331-1170  
Facsimile: (208) 331-1529

By **E. HOLMES**  
DEPUTY

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**PLAINTIFF'S MOTION IN LIMINE  
AND/OR IN THE ALTERNATIVE  
MOTION TO VACATE TRIAL**

COMES NOW, the Plaintiff/Counterdefendant, City of Meridian, ("City"), by and through their counsel of record, Kim J. Trout of Trout Jones Gledhill Fuhrman Gourley, P.A., pursuant to Rules 7(b)(1), 16(i), 26(e)(4) and 37(b)(2)(B), moves in limine for an Order of this Court that the testimony of the witnesses which were disclosed in Defendant's Supplemental Response dated October 29, 2010 in response to the City First Interrogatories and Requests for Production of Documents to the Defendant Petra, Incorporated, ("Petra"), is inadmissible and that counsel and all witness be instructed not to refer to, mention, or comment on the testimony of said late disclosed witnesses on the grounds that these witnesses were not disclosed to the City until 30 days before trial.

**PLAINTIFF'S MOTION IN LIMINE AND/OR IN THE ALTERNATIVE MOTION TO VACATE TRIAL**

In the alternative, Plaintiff is moving this Court to vacate trial and reset to a time convenient to all parties in order to allow additional time to depose the late disclosed witnesses.

This Motion is supported by the Affidavit of Kim J. Trout, and Memorandum in Support of Plaintiff's Motion in Limine and/or In the Alternative Motion to Vacate Trial filed contemporaneously herewith.

DATED this 2<sup>nd</sup> day of November, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.

By: 

Kim J. Trout  
Daniel Loras Glynn  
Attorneys for Plaintiff


### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2<sup>nd</sup> day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P.O. Box 9518  
Boise, Idaho 83707-9518  
Direct Facsimile: (208) 639-5609

Hand Delivered  
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Email

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Kim J. Trout

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED P.M. 374

NOV 12 2010

J. DAVID NAVARRO, Clerk  
By E. HOLMES  
DEPUTY

**KIM J. TROUT, ISB #2468**  
**DANIEL LORAS GLYNN, ISB #5113**  
**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.**  
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Facsimile: (208) 331-1529

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**AFFIDAVIT OF KIM J. TROUT IN  
SUPPORT OF PLAINTIFF'S MOTION  
IN LIMINE AND/OR IN THE  
ALTERNATIVE MOTION TO VACATE  
TRIAL**

STATE OF IDAHO )  
                              ) :ss  
County of ADA        )

KIM J. TROUT, being duly sworn upon oath, deposes and says:

1. I am at least eighteen (18) years of age and am competent to testify regarding the matters set forth herein.

2. I am a member of the law firm of TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A., representing the Plaintiff in this matter, and I make the following statements based upon my own personal knowledge.

*air*

3. On July 22, 2009, the City of Meridian served “Plaintiff’s First Set of Interrogatories, Requests for Production of Documents and Requests for Admissions to Defendant Petra Incorporated” upon the Defendant. The instructions contained within this original discovery request unequivocally state: “These Requests are continuing in nature and require supplementation pursuant to Idaho Rule of Civil Procedure Rule 26(e), anytime before trial, and in no event later than 45 days before trial.” 45 days prior to trial was October 17, 2010. Attached hereto and marked as **Exhibit “A”** is a true and correct copy of the pertinent portion of “Plaintiff’s First Set of Interrogatories, Requests for Production of Documents and Requests for Admission to Defendant Petra.”

4. On August 21, 2009, Petra served “Petra Incorporated Response Dated August 21, 2009 to the City of Meridian’s First Set of Interrogatories, Requests for Production of Documents and request for Admissions to Defendant Petra Incorporated” upon Plaintiff. In its response to interrogatory number 1, which requested Petra to “identify each and every person known to Petra who has information regarding anything having to do with (a) the Claims made Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge,” Defendant listed 41 names which were primarily either City employees or Petra employees (present or former). Attached hereto and marked as **Exhibit “B”** is a true and correct copy of the pertinent portion of “Petra’s Response Dated August 21, 2009 to the City of Meridian’s First Set of Interrogatories, Requests for Production of Documents and request for Admissions to Defendant Petra Incorporated.”

5. On October 2, 2009, Petra served “Petra Incorporated’s Clerical Amendments and Supplemental Response Dated October 2, 2009 to the City of Meridian’s First Interrogatories and



Request for Production of Documents to Defendant Petra Incorporated” upon Plaintiff. Petra supplemented Interrogatory No. 1 with an additional 5 names. Attached hereto and marked as **Exhibit “C”** is a true and correct copy of the pertinent portion of “Petra Incorporated’s Clerical Amendments and Supplemental Response Dated October 2, 2009 to the City of Meridian’s First Interrogatories and Request for Production of Documents to Defendant Petra Incorporated.”

6. On October 29, 2010, Petra served “Petra Incorporated’s Supplemental Response Dated October 29, 2010 to the City of Meridian’s First Interrogatories and Requests for Production of Documents to Defendant Petra Incorporated.” In this supplemental response, Petra lists an additional 28 names, many of which are either Prime Contractors or Suppliers who worked on or supplied material for the City of Meridian City Hall project. Additionally, Petra also indicates in it’s response that the contractors are expected to testify regarding their work on the project and offer rebuttal testimony as necessary. Attached hereto and marked as **Exhibit “D”** is a true and correct copy of the pertinent portion of “Petra Incorporated’s Supplemental Response Dated October 29, 2010 to the City of Meridian’s First Interrogatories and Requests for Production of Documents to Defendant Petra Incorporated.”

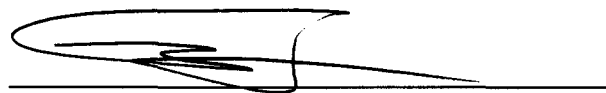
7. This late disclosure will require the City to conduct numerous depositions in order to prepare this matter for trial and to defend itself against Defendant’s counterclaims.

8. Those depositions will necessarily have to be reviewed by the City’s experts in order to provide rebuttal testimony.

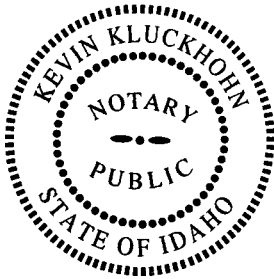
FURTHER YOUR AFFIANT SAYETH NAUGHT.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, PA

By:

  
Kim J. Trout

Subscribed and sworn to before me this 12<sup>th</sup> day of November, 2010.



A handwritten signature in black ink, likely belonging to the Notary Public, Kevin Kluckhohn.

Notary Public, State of Idaho

Residing at: Meridian, ID

My commission expires: November 3, 2014

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12<sup>th</sup> day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
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Direct Facsimile: (208) 639-5609

Hand Delivered

U.S. Mail

Fax

Email



A handwritten signature in black ink, likely belonging to Kim J. Trout.

Kim J. Trout

ORIGINAL

**KIM J. TROUT, ISB #2468**  
**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.**  
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Facsimile: (208) 331-1529

Attorneys for Plaintiff

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PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**PLAINTIFF THE CITY OF MERIDIAN  
FIRST SET OF INTERROGATORIES,  
REQUESTS FOR PRODUCTION OF  
DOCUMENTS AND REQUEST FOR  
ADMISSIONS TO DEFENDANT PETRA  
INCORPORATED**

Plaintiff, by and through its counsel of record, Trout Jones Gledhill Fuhrman, P.A., and pursuant to Rules 26, 33, 34, and 36 of the Idaho Rules of Civil Procedure and in accordance with the definitions and instructions set forth below, requests that the Defendant, Petra, Incorporated, (hereinafter "Petra" or "Defendant"), answer the following Interrogatories, Requests for Production of Documents, and Requests for Admissions in writing, under oath, and within thirty (30) days. These Requests are continuing in nature and require supplementation pursuant to Idaho Rule of Civil Procedure Rule 26(e), anytime before trial, and in no event later than 45 days before trial.

**PLAINTIFF THE CITY OF MERIDIAN FIRST SET OF INTERROGATORIES, REQUESTS  
PRODUCTION OF DOCUMENTS AND REQUEST FOR ADMISSIONS TO DEFENDANT  
INCORPORATED - 1**

EXHIBIT

A

006956

## GENERAL INSTRUCTIONS

Your answers and responses must be based both on documents and/or information in your possession, custody, or control, and on any documents or information available to Petra, Incorporated, (hereafter "Petra"), including documents and information in the possession of your agents, attorneys, accountants, or employees.

No document requested to be identified or produced or otherwise relevant to this dispute can be destroyed or disposed of by virtue of a record retention program or for any other reason. If any document requested to be identified or produced, was but no longer is in your possession, available to you, subject to your control, or in existence, please state whether it is: (1) missing or lost; (2) has been destroyed; (3) has been transferred, voluntarily or involuntarily, to others; or (4) otherwise disposed of. In each instance, please explain the circumstances surrounding the authorization of such disposition or destruction, the date authorization was given, as well as the date of destruction.

With respect to each document which is required to be identified or produced and which you presently contend you are not required to disclose because of any alleged "privilege" (which you are not presently prepared to waive), in lieu of the document identification or production called for, please identify each such "privileged" document in a "privilege log" and provide the following information: (1) give the date of each such document; (2) identify each individual who was present when it was prepared; (3) identify the individual or individuals responsible for preparing each such document; (4) identify the purpose for each such document's preparation; (5) identify each individual to whom a copy was sent; (6) identify each individual who has seen it; (7) identify each individual who has custody of it; (8) identify each and every document which refers to, discusses, analyzes, or comments upon it, in whole or in part, or which contains any or all of its contents; (9) describe the format of each document (including but not limited to letter, memorandum, computer

database, etc.) and; (10) state the nature of the privilege(s) asserted (including but not limited to attorney-client, work-product, etc.).

### **DEFINITIONS AND INSTRUCTIONS**

Unless otherwise indicated, the following definitions shall apply to these and subsequent discovery requests:

1. The words "and," "and/or," "or" refers to both their conjunctive and disjunctive meanings, being construed as necessary to bring within the scope of the discovery request all information and documents which would otherwise be construed as being outside the request.

2. "Claims made by Petra" or "Your Claims" mean the claims and causes of action set forth in the Answer and Counterclaim dated May 6, 2009.

3. "Claims made by Meridian" or "Meridian's Claims" means the claims and causes of action set forth in the Complaint dated April 16, 2009.

4. The term "communication" means any contact, oral or written, formal or informal, at any time or place, and under any circumstances whatsoever, whereby information of any nature was recorded, transmitted or transferred.

5. The term "computer" includes, but is not limited to, microchips, microcomputers (also known as personal computers), laptop computers, portable computers, notebook computers, palmtop computers (also known as personal digital assistants or PDAs), minicomputers, any phone capable of receiving, or sending or keeping a document or communication and mainframe computers.

6. The term "Defendant" shall mean Petra, Incorporated.

7. "Defenses asserted by Defendant" or "Petra's Defenses" mean the defenses asserted by Defendant in its Answer to Plaintiffs Complaint.

8. "Defenses asserted by Plaintiff" or Meridian's Defenses" mean the defenses asserted by Plaintiff in its Answer to Defendant's Counterclaim.

9. "Document" or "documents" means the original, all copies and drafts of papers and writings of every kind, description and form, whether handwritten or typed, and all mechanical, magnetic media and electronic recordings (including but not limited to, hard disks, floppy disks, compact disks, and magnetic tapes of any kind), records and data of every kind, description and form, and all photographs of every kind, and including without limiting the generality of the foregoing, the following: correspondence, letters, notes, e-mails, computer files, memoranda, reports, notebooks, binders, drawings, studies, analyses, drafts, diaries, calendars, date books, appointment books, day-timers, intra-or inter-office communications, memoranda, reports, canceled checks, minutes, bulletins, circulars, pamphlets, telegrams, instructions, work assignments, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone  
**PLAINTIFF THE CITY OF MERIDIAN FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUEST FOR ADMISSIONS TO DEFENDANT PETRA INCORPORATED - 3**

statements, calendar and diary entries, desk calendars, appointment books, job or transaction files, books of account, ledgers, bank statements, promissory notes, invoices, charge slips, working papers, graphs, charts, lab books, lab notes, lab journals or notebooks, evaluation or appraisal reports, pleadings, transcripts of testimony or other documents filed or prepared in connection with any court or agency or other proceeding, deeds, mortgages, deeds of trust, contracts, agreements, assignments, instruments, charges, opinions, official statements, prospectuses, appraisals, feasibility studies, trust, releases of claims, charters, certificates, licenses, leases, invoices, computer printouts or programs, summaries, audio, video or sound recordings, cassette tapes, video recorded, electronic or laser recorded, or photographed information. Documents are to be taken as including all attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

10. The term "electronic data" means the original (or identical duplicate when the original is not available) and any nonidentical copies (whether non-identical because of notes made on copies or attached comments, annotations, marks, transmission notations, or highlighting of any kind) of writings of every kind and description whether inscribed by mechanical, facsimile, electronic, magnetic, digital or other means. Electronic data includes, by way of example only, computer programs (whether private, commercial or work-in-progress), programming notes or instructions, activity listings of electronic mail receipts and/or transmittals, output resulting from the use of any software program, including word processing documents, spreadsheets, database files, charts, graphs and outlines, electronic mail, operating systems, source code of all types, peripheral drivers, PDF files, batch files, ASCII files, and any and all miscellaneous files and/or file fragments, regardless of the media on which they reside and regardless of whether said electronic data consists in an active file, deleted file or file fragment. Electronic data includes any and all items stored on computer memories, hard disks, floppy disks, CD-ROMS, removable media such as ZIP disks, Jaz cartridges, Bernoulli Boxes, and their equivalent, magnetic tapes of all types, microfiche, punch cards, punched tape, computer chips, including but not limited to EPROM, PROM, RAM and ROM, on or in any other vehicle for digital data storage and/or transmittal. The term electronic also includes the file, folder tabs and/or containers and labels appended to or associated with, any physical storage device associated with each original and/or copy.

11. The term "electronic format" means "electronic data" generated by a "computer."

12. "Identify" when used with respect to a document, item or thing means to provide the following information relating to such document, item or thing:

A description of the nature and contents of the document in such a manner that the custodian of the document would be able to locate it in response to a subpoena or request for product;

The date the document was made or entered into and the name, address, telephone number, occupation, job title and employer of each person whose testimony could be used to authenticate such document and lay the foundation for its introduction into evidence;

The identity of the person(s) to whom the document was sent, and who received each and every copy of the document; and

The name, address, telephone number, occupation, job title, and employer of the present custodian thereof.

13. The term "Identify" when used in reference to any electronic data or electronic media, means to state the software and/or operating system under which the data was created, title  
**PLAINTIFF THE CITY OF MERIDIAN FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUEST FOR ADMISSIONS TO DEFENDANT PETRA INCORPORATED - 4**

and author, the type of data (i.e., word processing documents, spreadsheet, database, application, program, etc.), file formats such data can be converted into, all other necessary information to identify and access such data, and its present or last known location or custodian. If any such electronic data was, or no longer is, in the possession, custody, or control, state what disposition was made of it and the reason for such disposition.

14. The term "Identify" when used with respect to a person that is not a natural person means, to the extent applicable, to provide the same information required as though the entity were a natural person and:

The nature of the entity; and

The identity of the person or persons who are its partners, owners, or hold controlling interests.

15. The term "Identify" when used with respect to a fact or allegation means that you provide a full and complete description of the fact or allegation, whether you admit that the fact or allegation is true, correct and complete, and if you do not so admit, describe fully the reason or reasons why you do not or cannot so admit that the fact or allegation is true, correct and complete.

16. "Identify" when used with respect to a natural person means that you provide the following information with respect to the person:

The name;

The residence address and telephone number; and

The name of employer or business with whom the person was associated and the person's title and position at the time relevant to the identification.

17. "Including" means including, but not limited to the specific items identified after the word "including."

18. "Intra-company" shall mean any document by or between any officer, any present and former employees, any person acting or purporting to act on Petra's behalf, agents, representatives, personnel, attorneys, accountants, consultants, experts, investigators, independent contractors, or contractors and any persons identified herein.

19. "Meridian" means The City of Meridian, the Plaintiff.

20. The term "person" means a natural person, or an entity, including but not limited to partnerships, limited liability companies, corporations, or trusts. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

21. "Petra" means Petra, Incorporated, the Defendant.

22. "Plaintiff" means The City of Meridian "Meridian".

23. "Produce" means to provide the originals or, if the originals are not available, true, correct, complete and legible Bates numbered copies of each and every document identified by You.

24. "Project" shall mean Owner desire to abate and demolish the existing structures on the Sire and develop a new city hall facility thereon consisting of a four story structure with

approximately 80,000 square feet of standard Class A office space and related improvement with surface parking.

25. The words "relate to" or "relating to" mean and include the following terms: regards, describes, involves, compares, correlates, mentions, connected to, refers to, pertains to, contradicts, or compromises.

26. The term "relevant period" or "relevant period of time" means the period commencing on January 1, 2006, and continuing to the present.

27. "You," "your," "yours," shall mean Petra or any person acting or purporting to act on Petra's behalf, including without limitation, all present and former employees, officers, agents, representatives, personnel, attorneys, accountants, consultants, experts, investigators, independent contractors, or other persons.

28. "Construction Management Agreement," "the Agreement," "Agreement" shall mean the specific written agreement between the City of Meridian and Petra Incorporated for the New Meridian City Hall dated August 1, 2006.

29. State the basis" for a claim, allegations or denial means to provide the complete factual summary of each of the elements of the claim, allegation, or denial. The summary should chronologically describe each and every fact, action, and occurrence that related to the particular claim, allegation or denial. In describing each such fact, action, and occurrence, (i) do so in accordance with the definitions of these terms set forth herein, (ii) identify each individual, entity, and organizational unit claimed to be involved therein, and (iii) in each instance, identify the source from which the information set forth in your response with respect to that particular fact, action, occurrence, document, individual, entity, and/or organizational unit, was obtained.

30. In the event you assert any form of objection or privilege as a ground for not answering an Interrogatory or any part of an Interrogatory, set forth the legal grounds and facts upon which the objection or privilege is based. If the objection relates to only part of the Interrogatory, the balance of the Interrogatory should be answered in full.

31. Defendants, pursuant to Rule 34 of the Idaho Rules of Civil Procedure, request the production for inspection and copying of the documents within the time provided by law. In lieu of production, Plaintiffs may provide copies of such documents within the time provided by law.



## **INTERROGATORIES**

**INTERROGATORY NO. 1:** Identify each and every person known to Petra who has information regarding anything having to do with (a) the Claims made Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge.

**INTERROGATORY NO. 2:** Identify each and every person known to Petra who has given a statement, affidavit or declaration regarding anything having to do with (a) the Claims made by Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge.

**INTERROGATORY NO. 3:** Identify each and every investigation and/or interview and/or accounting with respect to (a) the Claims made by Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian undertaken by You; identify the reasons why each such investigation and/or interview and/or accounting was undertaken; identify the dates of each such investigation and/or interview and/or accounting; identify the person who was responsible for each investigation and/or interview and/or accounting; identify the manner in which each investigation and/or interview and/or accounting was pursued; identify the findings of each investigation and/or interview and/or accounting; and identify each and every document, tape, transcript, memorandum, or correspondence relating to each such investigation and/or interview and/or accounting, as well as the location of each document.

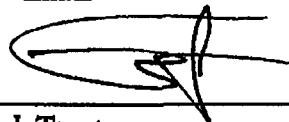
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 22<sup>nd</sup> day of July, 2009, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSH O HUMPHREY, LLP  
800 Park Blvd., Ste. 790  
P.O. Box 9518  
Boise, ID 83707-9518  
Fax: (208) 639-5609

Hand Delivered  
U.S. Mail  
Fax  
Fed. Express  
Email

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<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>



Kim J. Trout

AUG 24 2009

ORIGINAL

Thomas G. Walker (ISB 1856)  
MacKenzie Whatcott (ISB 5509)  
COSH O HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
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Direct Facsimile: (208) 639-5609  
E-mail: twalker@cosholaw.com; mwhatcott@cosholaw.com

Attorneys for Defendant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant.

Case No. CV OC 0907257

**PETRA INCORPORATED RESPONSE  
DATED AUGUST 21, 2009 TO THE CITY  
OF MERIDIAN'S FIRST SET OF  
INTERROGATORIES, REQUESTS FOR  
PRODUCTION OF DOCUMENTS AND  
REQUEST FOR ADMISSIONS TO  
DEFENDANT PETRA INCORPORATED**

Petra Incorporated ("Petra"), by and through its undersigned counsel, pursuant to Rules 33, 34 and 36 of the Idaho Rules of Civil Procedure, responds to Plaintiffs City of Meridian's (Meridian) First Set of Interrogatories, Requests for Production of Documents and Requests for Admissions, served on or about July 22, 2009 as follows:

PETRA INCORPORATED RESPONSE DATED AUGUST 21, 2009 TO THE CITY OF  
MERIDIAN'S FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION  
OF DOCUMENTS AND REQUEST FOR ADMISSIONS TO DEFENDANT PETRA INCORPORATED



## **GENERAL OBJECTIONS**

1. Petra objects to each Interrogatory, Request for Production and Request for Admission to the extent that it seeks to elicit information subject to and protected by the attorney-client privilege and the attorney work-product doctrine. Nothing contained in these responses is intended to be or should be construed as a waiver of the attorney-client privilege or attorney work-product protection, or any other applicable privilege, protection or doctrine.

2. Petra objects to each Interrogatory, Request for Production and Request for Admission to the extent it seeks documents that contain confidential information, or which would impinge on the constitutionally or statutorily protected right of individuals.

3. Petra objects to each Interrogatory, Request for Production and Request for Admission to the extent that it attempts to place a burden on Petra that exceeds the duties set forth in the Idaho Rules of Civil Procedure.

4. Petra objects to each Interrogatory, Request for Production and Request for Admission to the extent the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other sources, including but not limited to Plaintiff, that is more convenient, less burdensome, or less expensive. Petra also objects to each Interrogatory and Request for Production of Documents to the extent the burden or expense of the discovery sought outweighs its likely benefit.

5. These responses are made solely for the purpose of discovery in this action. Nothing herein is intended to waive the following objections, which are expressly reserved: all objections as to competency, relevancy, authenticity, propriety, materiality, and admissibility of

the subject matter of the discovery requests; all objections as to vagueness, ambiguity, or undue burden; all objections on any ground as to the use of any information provided in response to these discovery requests; all objections on any ground to any request for further responses to these or other discovery requests; and any and all other objections and grounds that would or could require or permit the exclusion of any document or statement there from evidence, all of which objections and grounds are reserved and may be interposed at the time of trial.

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Subject to the foregoing objections and such other objection as may be noted below, Petra responds as follows:

The definitions previously provided in Petra's discovery requests and responses are incorporated herein. In addition, the subject Meridian City Hall project is referred to as the "Project" and the City of Meridian is referred to as the City, Meridian, and the Plaintiff.

### **INTERROGATORIES**

**INTERROGATORY NO. 1:** Identify each and every person known to Petra who has information regarding anything having to do with (a) the Claims made Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge.

### **RESPONSE:**

1. Jerry Frank, Petra Incorporated, who may be contacted through Petra's counsel. Mr. Frank is expected to testify consistent with the responses set forth herein.

2. John Quapp, Petra Incorporated, who may be contacted through Petra's counsel.  
Mr. Quapp is expected to testify consistent with the responses set forth herein.

3. Eugene Bennett, Petra Incorporated, who may be contacted through Petra's counsel.  
Mr. Bennett is expected to testify consistent with the responses set forth herein.

4. Arthur Stevens, Petra Incorporated, who may be contacted through Petra's counsel.  
Mr. Stevens' testimony is not presently known to Petra.

5. Thomas R. Coughlin, Petra Incorporated, who may be contacted through Petra's counsel.  
Mr. Coughlin's testimony is not presently known to Petra.

6. Debbie Gorski, Petra Incorporated, who may be contacted through Petra's counsel.  
Ms. Gorski's testimony is not presently known to Petra.

7. Monica Pope, Petra Incorporated, who may be contacted through Petra's counsel.  
Ms. Pope's testimony is not presently known to Petra.

8. Nick Ploetz, Petra Incorporated, who may be contacted through Petra's counsel.  
Mr. Ploetz's testimony is not presently known to Petra.

9. Barbara Crawford Petra Incorporated, who may be contacted through Petra's counsel.  
Ms. Crawford's testimony is not presently known to Petra.

10. Connie Creager – former Petra employee; 1627 W Georgia Ave Nampa 83686.  
Ms. Creager's testimony is not presently known to Petra.

11. Cleve Cushing – former Petra employee; 4681 W Moonlake Dr Meridian 83646  
Ph. (208) 288-0366. Mr. Cushing's testimony is not presently known to Petra.

12. Pat Kershisnik – former Petra employee; address and telephone number unknown.

Mr. Kershisnik's testimony is not presently known to Petra.

13. Pat Child – former Petra employee; 674 Tiffany Dr Meridian 83642 Ph. (208)

884-3127. Mr. Child's testimony is not presently known to Petra.

14. Scott Trepagnier –former Petra employee; 1691 NW 11<sup>th</sup> Ave Meridian 83646.

Mr. Trepagnier's testimony is not presently known to Petra.

15. Wes Bettis – ESI, 12400 W. Overland Road, Boise, ID 83709 Ph: 208-362-3040;

14602 River Rd Caldwell 83607. Mr. Bettis's testimony is not presently known to Petra.

16. Jon Anderson – ESI, 12400 W. Overland Road, Boise, ID 83709 Ph: 208-362-

3040; 14475 Elmspring Boise 83713 Ph. (208) 939-4626. Mr. Anderson's testimony is not presently known to Petra.

17. Jack Vaughn – Northcon, Inc, 4662 Henry Street, Suite A, Boise, ID 83709

Ph: 208-344-4000; 3355 N Five Mile #231 Boise 83713 Ph. (208) 585-2147. Mr. Vaughn's testimony is not presently known to Petra.

18. Adam Johnson – ESI, 12400 W. Overland Road, Boise, ID 83709 Ph.: 208-362-

3040; 4384 S Corbari Ave Boise 83709 Ph. (208) 919-4891. Mr. Johnson's testimony is not presently known to Petra.

19. Drew Brown – Hill Construction, 760 E King St Ste 107, Meridian, ID 83642,

(208) 898-9910; 7986 W Grubstake Ave Boise 83709, (559) 381-0993. Mr. Brown's testimony is not presently known to Petra.

20. Steve Simmons – LCA; 1221 Shoreline Ln, Boise, ID 83702; Ph: 208-345-6677.

Mr. Simmon's testimony is not presently known to Petra.

21. Steve Christiansen – LCA; 1221 Shoreline Ln, Boise, ID 83702; Ph: 208-345-

6677. Mr. Christiansen's testimony is not presently known to Petra.

22. Brent Pitts – LCA; 1221 Shoreline Ln, Boise, ID 83702; Ph: 208-345-6677. Mr.

Pitt's testimony is not presently known to Petra.

23. Russ Moorhead – LCA; 1221 Shoreline Ln, Boise, ID 83702; Ph: 208-345-6677.

Mr. Moorhead's testimony is not presently known to Petra.

24. Tammy de Weerd – COM, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-

4433. Mayor de Weerd's testimony is not presently known to Petra.

25. Keith Bird – COM Council, 33 E Broadway St, Meridian, ID 83642; Ph.: 208-

888-4433. Mr. Bird's testimony is not presently known to Petra.

26. Keith Watts – Meridian Council, 33 E Broadway St, Meridian, ID 83642; Ph.:

208-888-4433. Mr. Watt's testimony is not presently known to Petra.

27. Will Berg – former Meridian employee. Neither Mr. Berg's location nor his testimony is presently known to Petra.

28. Ted Baird – COM, 33 E Broadway St, Meridian, ID 83642; Ph.: 208-888-4433.

Mr. Baird's testimony is not presently known to Petra.

29. Bill Nary – COM, 33 E Broadway St, Meridian, ID 83642; Ph.: 208-888-4433.

Mr. Nary's testimony is not presently known to Petra.



30. Brad Watson – former COM employee. Neither Mr. Watson’s testimony nor his location is presently known to Petra.

31. Charlie Roundtree – COM Council, 33 E Broadway St, Meridian, ID 83642; Ph.: 208-888-4433. Mr. Rondtree’s testimony is not presently known to Petra.

32. David Zarembo – COM Council, 33 E Broadway St, Meridian, ID 83642; Ph.: 208-888-4433. Mr. Zarembo’s testimony is not presently known to Petra.

33. Brad Hoaglund – COM Council, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-4433. Mr. Hoaglund’s testimony is not presently known to Petra.

34. Joseph Borton, Esq. – former Meridian Council, Rose Law Group, 6223 North Discovery Way, Ste. 200, Boise, Idaho 83713. Mr. Anderson’s testimony is not presently known to Petra.

35. Kathy Wanner – Meridian, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-4433. Ms. Wanner’s testimony is not presently known to Petra.

36. Stacy Kilchenmann – Meridian, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-4433. Ms. Kilchenmann’s testimony is not presently known to Petra.

37. Ed Ankerman – former Meridian employee. Neither Mr. Ankerman’s testimony nor his location is presently known to Petra.

38. Tom Jackson – Meridian, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-4433. Mr. Jackson’s testimony is not presently known to Petra.

39. Tom Barry – Meridian, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-4433. Mr. Barry’s testimony is not presently known to Petra.

40. Elroy Huff—Meridian, 33 E Broadway St, Meridian, ID 83642; Ph: 208-888-4433. Mr. Huff's testimony is not presently known to Petra.

41. Frank Lee, Givens Pursley LLP, 601 West Bannock Street, Boise, ID 83702, (208) 388-1200 — Mr. Lee's testimony is not presently known to Petra.

**INTERROGATORY NO. 2:** Identify each and every person known to Petra who has given a statement, affidavit or declaration regarding anything having to do with (a) the Claims made by Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge.

**RESPONSE:** None. This response will be supplemented as required by the Idaho Rules of Civil Procedure and orders of the Court.

**INTERROGATORY NO. 3:** Identify each and every investigation and/or interview and/or accounting with respect to (a) the Claims made by Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian undertaken by You; identify the reasons why each such investigation and/or interview and/or accounting was undertaken; identify the dates of each such investigation and/or interview and/or accounting; identify the person who was responsible for each investigation and/or interview and/or accounting; identify the manner in which each investigation and/or interview and/or accounting was pursued; identify the findings of each investigation and/or interview and/or accounting; and identify each and every document, tape, transcript, memorandum, or

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 21<sup>st</sup> day of August, 2009 a true and correct copy of the  
within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☒ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☐ Facsimile:  
☐ E-mail:

  
THOMAS G. WALKER

ORIGINAL

OCT 05 2009

Thomas G. Walker (ISB 1856)  
MacKenzie Whatcott (ISB 5509)  
COSH O HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
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E-mail: twalker@cosholaw.com; mwhatcott@cosholaw.com

Attorneys for Defendant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

vs.

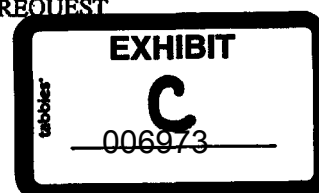
PETRA INCORPORATED, an Idaho  
corporation,

Defendant.

Case No. CV OC 0907257

**PETRA INCORPORATED'S CLERICAL  
AMENDMENTS AND SUPPLEMENTAL  
RESPONSE DATED OCTOBER 2, 2009 TO  
THE CITY OF MERIDIAN'S FIRST  
INTERROGATORIES AND REQUESTS FOR  
PRODUCTION OF DOCUMENTS TO  
DEFENDANT PETRA INCORPORATED**

Petra Incorporated ("Petra"), by and through its undersigned counsel, pursuant to Rule 34 of the Idaho Rules of Civil Procedure, amends and supplements its response to Plaintiff's City of Meridian's (Meridian) First Requests for Production of Documents, served on or about July 22, 2009 as follows:



Petra incorporates by reference herein as if fully set out its General Objections contained in its response dated August 21, 2009.

**INTERROGATORY NO. 1:** Identify each and every person known to Petra who has information regarding anything having to do with (a) the Claims made Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge.

**SUPPLEMENTAL RESPONSE:**

- 42. Jerry Dillon – Former Petra employee, address and telephone number unknown.
- 43. Mike Wisdom – Engineering Inc., 2222 Broadway, Boise, ID 83706, Ph: 208-343-3663;
- 44. Jan Welch – Stapley Engineering, 8702 W. Hackamore Drive, Boise, ID 83709; Ph: 208-375-8240;
- 45. Geoff Johnson – Eidam & Associates; 815 Park Blvd., Suite 230, Boise, ID 83712; Ph: 208-345-7127;
- 46. Warren Stewart – former Elk Mountain Engineering principal, Address unknown.

**CLERICAL AMENDMENT TO RESPONSE DATED AUGUST 21, 2009, Item No. 34.**

Should correctly state: “Mr. Borton’s testimony is not presently known to Petra.

**CLERICAL AMENDMENT TO RESPONSE DATED AUGUST 21, 2009, Item No. 37:**

Should read: Ed Ankenman.

**INTERROGATORY NO. 4:** Identify each and every written and oral agreement by and between Petra and Meridian entered into during the relevant period of time with respect to (a) the Claims made by Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian.

**AMENDED RESPONSE TO ITEM NO. 4:**

4. Construction Management Agreement for the City Hall East Park Lot. Scope of work based on Petra proposal dated October 6, 2008.

**INTERROGATORY NO. 11:** Identify each and every lawsuit in which Petra has been a party since January 1, 1999.

**SUPPLEMENTAL RESPONSE:** In addition to the cases previously identified in response to Interrogatory No. 11 served August 21, 2009 and Supplemental Response dated September 30, 2009, Petra has identified the following case numbers with regard to the following:

Precision Interiors v. Petra Incorporated  
BHM & Assoc v. Petra Incorporated JV et al.  
Petra Incorporated v. Boise Associates – Ada County Case No. CV OC 9800867D;  
Silver Creek Computer Co v. Petra Incorporated - Ada County Case No. 9900246D;  
Petra Incorporated v. Hruza – Canyon County Case No. 99-04005  
Advanced Heating & Cooling v Petra Incorporated - Ada County Case No. 9907049D  
Petra Incorporated v. Advanced Stucco & Painting - Ada County Case No.0005217D  
Bellomy Inc v. Petra Incorporated - Ada County Case No.05001418

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 2<sup>nd</sup> day of October, 2009 a true and correct copy of the  
within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

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<input type="checkbox"/>	Hand Delivery
<input type="checkbox"/>	Overnight Courier
<input type="checkbox"/>	Facsimile:
<input type="checkbox"/>	E-mail:

  
THOMAS G. WALKER

ORIGINAL

Thomas G. Walker (ISB 1856)  
MacKenzie Whatcott (ISB 5509)  
COSH O HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: twalker@cosholaw.com; mwhatcott@cosholaw.com

Attorneys for Defendant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

vs.

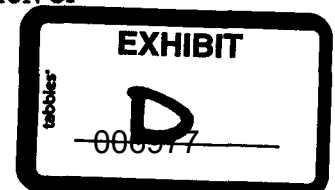
PETRA INCORPORATED, an Idaho  
corporation,

Defendant.

Case No. CV OC 0907257

**PETRA INCORPORATED'S  
SUPPLEMENTAL RESPONSE DATED  
OCTOBER 29, 2010 TO THE CITY OF  
MERIDIAN'S FIRST INTERROGATORIES  
AND REQUESTS FOR PRODUCTION OF  
DOCUMENTS**

Petra Incorporated ("Petra"), by and through its undersigned counsel, pursuant to Rules 33 and 34 of the Idaho Rules of Civil Procedure, supplements its response to Plaintiff City of Meridian's (Meridian) First Set of Interrogatories and Requests for Production of Documents, served on or about July 22, 2009 as follows:





**INTERROGATORY NO. 1:** Identify each and every person known to Petra who has information regarding anything having to do with (a) the Claims made Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge.

**SUPPLEMENTAL RESPONSE:** The following persons are added to Petra's response:

47. Jack K. Lemley, Lemley International, 604 North 16<sup>th</sup> Street, Boise, Idaho 83702;
48. Richard Bauer, Lemley International, 604 North 16<sup>th</sup> Street, Boise, Idaho 83702;
49. Keith Pinkerton, Hooper Cornell, PLLC, 250 Bobwhite Court, Suite 300, Boise, Idaho 83706;
50. Dennis Reinstein, Hooper Cornell, PLLC, 250 Bobwhite Court, Suite 300, Boise, Idaho 83706;
51. Darrell Coleman, Alpha Masonry;
52. Tim McGourty, TMC Masonry Contractors;
53. Mike Miller, M.R. Miller;
54. Tom Zabala or other representative of ZGA Architects;
55. Glenn Hickey, Custom Precast;
56. Rob Drinkard, Western Roofing Contractors;

57. Jeff Brewer, Western Roofing Contractors;
58. Ted Davis, Western Roofing Contractors;
59. Jay Goodsen, Tri State Electric;
60. Randy Frisbee, Hobson Fabricating, Inc.
61. Ted Frisbee, Sr., Hobson Fabricating, Inc.
62. Ted Frisbee, Jr., Hobson Fabricating, Inc.
63. Pat Clover (Hobson Fabricating, Inc.)
64. Dell Hatch, Hatchmueller Landscape Architects;
65. Chuck Hurn, Heery International;
66. Troy Kunas, Heery International;
67. Lenny Buss, Buss Mechanical;
68. John Buss, Buss Mechanical
69. One or more representatives of Yamas (HVAC equipment);
70. One or more representatives of Versico (regarding roofing materials);
71. Sheldon Morgan, Custom Glass;
72. Randy Pierce, American Wall Covering;
73. Stewart Jensen, D&A Door;
74. Dave Cram, MTI

Mr. Lemley and Mr. Bauer are expected to testify consistent with their affidavit and deposition testimony given in this matter.

Mr. Pinkerton and Mr. Reinstein are expected to testify consistent with their deposition testimony to be given in this matter.

Contractors are expected to testify regarding their work on the project and offer rebuttal testimony as necessary.

Petra also reserves the right to call any person identified by the Plaintiff either in Petra's case-in-chief or on rebuttal.

**INTERROGATORY NO. 2:** Identify each and every person known to Petra who has given a statement, affidavit or declaration regarding anything having to do with (a) the Claims made by Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge.

**RESPONSE:** See Petra's Supplemental Response to Interrogatory No. 1. Petra may also offer testimony by Jerald Frank, Eugene Bennett, Thomas Coughlin and John Quapp consistent with the affidavits filed in this matter and with regard to Frank, Bennett and Coughlin, consistent with their respective deposition testimony.

**INTERROGATORY NO. 3:** Identify each and every investigation and/or interview and/or accounting with respect to (a) the Claims made by Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian undertaken by You; identify the reasons why each such investigation and/or interview and/or accounting was

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY That on the 29<sup>th</sup> day of October, 2009 a true and correct copy of  
the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

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<input type="checkbox"/>	Overnight Courier
<input type="checkbox"/>	Facsimile:
<input type="checkbox"/>	E-mail:

  
THOMAS G. WALKER

NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED \_\_\_\_\_ P.M. \_\_\_\_\_

NOV 12 2010

J. DAVID NAVARRO, Cler  
By E. HOLMES  
DEPUTY

**KIM J. TROUT, ISB #2468**  
**DANIEL LORAS GLYNN, ISB #5113**  
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.  
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Facsimile: (208) 331-1529

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S MOTION IN LIMINE TO  
EXCLUDE TESTIMONY OF LATE  
DISCLOSED WITNESSES AND/OR IN  
THE ALTERNATIVE MOTION TO  
VACATE TRIAL**

The Plaintiff/Counterdefendant, City of Meridian, ("City"), submits the following memorandum in support of its Motion in Limine to Exclude Testimony of Late Disclosed Witnesses and/or In the Alternative A Motion to Vacate Trial.

**INTRODUCTION**

On July 22, 2009, the City of Meridian served "Plaintiff's First Set of Interrogatories, Requests for Production of Documents and Requests for Admissions to Defendant Petra Incorporated" upon the Defendant. The instructions contained within this original discovery request unequivocally state: "These Requests are continuing in nature and require supplementation

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE TESTIMONY  
OF LATE DISCLOSED WITNESSES AND/OR IN THE ALTERNATIVE MOTION TO VACATE TRIAL-**

pursuant to Idaho Rule of Civil Procedure Rule 26(e), anytime before trial, and in no event later than 45 days before trial.” 45 days prior to trial was October 17, 2010.

On August 21, 2009, Petra served “Petra Incorporated Response Dated August 21, 2009 to the City of Meridian’s First Set of Interrogatories, Requests for Production of Documents and request for Admissions to Defendant Petra Incorporated” upon Plaintiff. In its response to interrogatory number 1, which requested Petra to “identify each and every person known to Petra who has information regarding anything having to do with (a) the Claims made Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge,” Defendant listed 41 names which were primarily either City employees or Petra employees (present or former).

On October 2, 2009, Petra served “Petra Incorporated’s Clerical Amendments and Supplemental Response Dated October 2, 2009 to the City of Meridian’s First Interrogatories and Request for Production of Documents to Defendant Petra Incorporated” upon Plaintiff. Petra supplemented Interrogatory No. 1 with an additional 5 names.

On October 29, 2010, Petra served “Petra Incorporated’s Supplemental Response Dated October 29, 2010 to the City of Meridian’s First Interrogatories and Requests for Production of Documents to Defendant Petra Incorporated.” In this supplemental response, Petra lists an additional 28 names, many of which are either Prime Contractors or Suppliers who worked on or supplied material for the City of Meridian City Hall project. Additionally, Petra also indicates in it’s response that the contractors are expected to testify regarding their work on the project and offer rebuttal testimony as necessary.

## ARGUMENT

When a party tardily discloses the identity of a witness, the district court should consider the importance of the testimony, the time necessary for the other party to prepare, and the possibility of a continuance. *McKim v. Horner*, 143 Idaho 568, 571, 149 P.3d 843, 846 (Idaho 2006) (citing *Viehweg v. Thompson*, 103 Idaho 265, 271, 647 P.2d 311, 317 (App. 1982)).

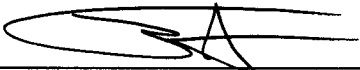
This matter concerns a construction project that spanned two and a half years. During the construction which Petra oversaw there were approximately forty prime-contracts for various components of the construction. Thus, Petra was well aware of all the contractors who worked on this project. A substantial amount of discovery has already been conducted by the City in order to properly prepare this matter for trial and to defend itself against Defendant's Counterclaims. After all this effort and expense on the City's behalf, and with trial less than one (1) month away, Petra has "sandbagged" the City with the disclosure of these additional 28 witnesses which it previously knew about and should have previously disclosed. This late disclosure will require the City to conduct numerous depositions in order to properly prepare this matter for trial and to defend itself against Defendant's Counterclaims. Those depositions will necessarily have to be reviewed by the City's experts in order to provide rebuttal testimony. Due to this fact, the City is requesting that Court impose the sanction of excluding these witnesses or in the alternative grant the City a continuance in order to depose these late disclosed witnesses.

## CONCLUSION

For the reasons stated, the City respectfully requests that this Court grant its Motion in Limine, or in the alternative, grant its Motion to Vacate Trial.

DATED this 12<sup>th</sup> day of November, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.

By:   
\_\_\_\_\_  
Kim J. Trout  
Daniel Loras Glynn  
Attorneys for Plaintiff

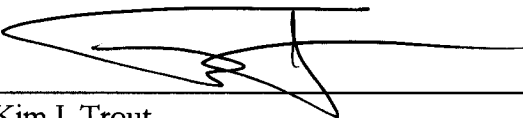
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12<sup>th</sup> day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

Thomas G. Walker  
MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P.O. Box 9518  
Boise, Idaho 83707-9518  
Direct Facsimile: (208) 639-5609

Hand Delivered  
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Email

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\_\_\_\_\_  
Kim J. Trout



NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

NOV 12 2010

J. DAVID NAVARRO, Clerk  
By E. HOLMES  
DEPUTY

**KIM J. TROUT, ISB #2468**

**DANIEL LORAS GLYNN, ISB#5113**

**TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.**

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Telephone: (208) 331-1170

Facsimile: (208) 331-1529

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant.

Case No. CV OC 09-7257

**MOTION TO SHORTEN TIME FOR  
HEARING**

COMES NOW Plaintiff, the City of Meridian ("City"), by and through its attorney of record, Kim J. Trout of the law firm of TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A., and hereby moves this Court, pursuant to Rule 6(b) of the Idaho Rules of Civil Procedure, for an order shortening the time for notice of hearing on Plaintiff's Motion in Limine and/or in the Alternative Motion to Vacate Trial.

DATED this 12<sup>th</sup> day of November, 2010.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN ♦ GOURLEY, P.A.

By: \_\_\_\_\_

KIM J. TROUT

Attorneys for Plaintiff


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12<sup>th</sup> day of November, 2010, a true and correct copy of the above and foregoing document was forwarded addressed as follows in the manner stated below:

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MacKenzie Whatcott  
COSHO HUMPHREY, LLP  
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Direct Facsimile: (208) 639-5609

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\_\_\_\_\_  
Kim J. Trout

ORIGINAL

NO. 70 FILED  
A.M. 70 P.M.  
NOV 15 2010  
J. DAVID NAVARRO, Clerk  
By E. HOLMES  
DEPUTY

Thomas G. Walker (ISB No. 1856)  
Erika K. Klein (ISB No. 5509)  
Mackenzie Whatcott (ISB No. 6774)  
Matthew B. Schelstrate (ISB No. 8276)  
COSHO HUMPHREY, LLP  
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E-mail: [twalker@cosholaw.com](mailto:twalker@cosholaw.com); [eklein@cosholaw.com](mailto:eklein@cosholaw.com);  
[mwhatcott@cosholaw.com](mailto:mwhatcott@cosholaw.com); [mschelstrate@cosholaw.com](mailto:mschelstrate@cosholaw.com)

Attorneys for Defendant/Counterclaimant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff/Counterdefendant,

v.

PETRA, INCORPORATED, an Idaho  
Corporation,

Defendant/Counterclaimant

Case No. CV OC 09-7257

MEMORANDUM IN SUPPORT OF  
PETRA'S OPPOSITION TO CITY'S  
MOTION TO DISMISS DEFENDANT'S  
CLAIM FOR LOST PROFITS AND/OR  
BUSINESS DEVASTATION PURSUANT  
TO THE IDAHO TORT CLAIMS ACT

The above-named Defendant/Counterclaimant, Petra Incorporated ("Petra"), by and through its attorney of record, Thomas G. Walker, of the law firm Cosho Humphrey, LLP submits this memorandum in opposition to the City's Motion to Dismiss Petra's claims for lost profits and earnings pursuant to the Idaho Tort Claims Act.

MEMORANDUM IN SUPPORT OF PETRA'S OPPOSITION TO CITY'S MOTION TO DISMISS  
DEFENDANT'S CLAIM FOR LOST PROFITS AND/OR BUSINESS DEVASTATION PURSUANT  
TO THE IDAHO TORT CLAIMS ACT  
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## **1. Introduction**

The City's attempt to gain a dismissal of Petra's damage claim for lost profits rests on a mischaracterization of the factual record and should be denied. The City has been on notice since May of 2009 that Petra seeks consequential damages of "lost past and future earnings and benefits" flowing from Meridian's breach of contract and breach of the covenant of good faith and fair dealing. Petra identified these damages in its original counterclaim and in its amended counterclaim.<sup>1</sup> Each of these counterclaims was filed within 180 days of the accrual of Petra's claim on February 24, 2009. Each of the counterclaims met the notice requirements of the Idaho Tort Claims Act ("ITCA") and Idaho Code § 50-219. A claimant is not required to submit a full-fledged expert report setting out every detail of its claim within 180 days of the accrual of the claim. Furthermore, Petra is not alleging a separate claim for business devastation. Petra seeks consequential damages flowing from the City's breach of contract and breach of the covenant of good faith and fair dealing, which include lost past and future earnings and benefits.

## **2. Law and Argument**

As the Court knows, after more than 16 months of litigation, the City claims it was not given sufficient notice of Petra's counterclaim. The Court has already ruled that Petra's claim arose on February 24, 2009, and that counsel for Petra's March 16, 2009 letter served as sufficient notice under the Act. After the City sued, Petra counterclaimed on May 6, 2009 for its remaining construction manager's fee and for "lost past and future earning and benefits" caused

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<sup>1</sup> See Affidavit of Thomas G. Walker dated Nov. 15, 2010 at ¶¶ 8, 9.

by the City's breach of contract and breach of the covenant of good faith and fair dealing. Petra then amended its counterclaim on August 21, 2009. Each of these pleadings was filed within 180 days of February 24, 2009. The counterclaim and the amended counterclaim put the City on notice that Petra was seeking consequential damages flowing from the City's breach of contract. Contrary to the City's allegation, Petra then supplemented its discovery responses with regard to its lost profits and earnings by the October 29, 2010 deadline.<sup>2</sup>

The City's argument mischaracterizes the record. The City states: ". . . Petra has known about this lost profits and/or business devastation claim since April 16, 2009. Accordingly, Petra was required to provide the City with proper notice of Petra's claim no later than October 19, 2009 . . . . Petra, however, did not allege its claim for lost profits and/or business devastation until producing the expert report on October 22, 2010 . . . ." <sup>3</sup> This is factually inaccurate. Petra filed its counterclaim, original and amended, within 180 days of accrual of the claim. Each counterclaim alleged consequential damages for lost earnings and benefits.

The City appears to argue that Petra is asserting a stand-alone claim for business devastation. This is not true, as the pleadings indicate. Likewise, there is no logic to the argument that Petra is required to commission an expert report on its damages within the 180-day timeframe. The City greatly overstates the type of notice the ITCA requires. The 180-day notice requirement of the ITCA contemplates *notice*; the ITCA does not require that a litigant

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<sup>2</sup> *Id.* at ¶¶ 3-6.

<sup>3</sup> See Memorandum in Support of Plaintiff's Motion to Dismiss Defendant's Claim for Lost Profits and/or Business Devastation pursuant to the Idaho Tort Claims Act, pp. 4-5.

with a municipality have its entire case ready for trial within 180 days of the accrual of its claim. *See Smith v. City of Preston*, 99 Idaho 618, 621, 586 P.2d 1062, 1065 (1978) (holding letter sufficient notice that did not specify a damage amount, which had yet to be determined, and where the City was not misled to its injury).

The primary purpose of the notice requirement of the ITCA is to “put the governmental entity on notice that a claim against it is being prosecuted and thus apprise it of the need to preserve evidence and perhaps prepare a defense.” *Blass v. County of Twin Falls*, 132 Idaho 451, 452-53, 974 P.2d 503, 504-05 (1999) (quoting *Smith*, 99 Idaho at 621, 586 P.2d at 1065)). It is clear this purpose has been fulfilled in this case. Petra’s correspondence, its counterclaims, and the circumstances that exist here where a governmental entity is the plaintiff, all demonstrate the purpose of the notice requirement has been satisfied.

Furthermore, there is no published Idaho decision holding that the notice requirements of the Idaho Tort Claims Act are not satisfied by a counterclaim. Petra has briefed this issue in response to the City’s first Motion to Dismiss under the ITCA, which the Court denied.<sup>4</sup> Petra will not repeat its briefing here.

Lastly, the City’s argument that it lacked notice of Petra’s claim for lost profits is not only a technical argument that ignores reality, it ignores governing law. The ITCA states: “A claim filed under the provisions of this section shall not be held invalid or insufficient by reason of an inaccuracy in stating the time, place, nature or cause of the claim, *or otherwise*, unless it is

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<sup>4</sup> See *Petra’s Memorandum in Opposition to Meridian’s Motion to Dismiss (Idaho Tort Claims Act)* filed with the Court on September 9, 2010.

show that the governmental entity *was in fact misled to its injury thereby.*” I.C. § 6-907 (emphasis added); *see Cox v. City of Sandpoint*, 140 Idaho 127, 132, 90 P.3d, 352, 357 (citing *Smith*, 99 Idaho at 621, 586 P.2d at 1065)). The Supreme Court has stated its policy is to “take a liberal approach to interpreting the notice requirement of the Idaho Tort Claims Act.” *Farber v. State*, 102 Idaho 398, 630 P.2d 685, 689 (1981). The City has not presented any evidence it was “misled to its injury.” The City does not attempt to make this argument in its brief.

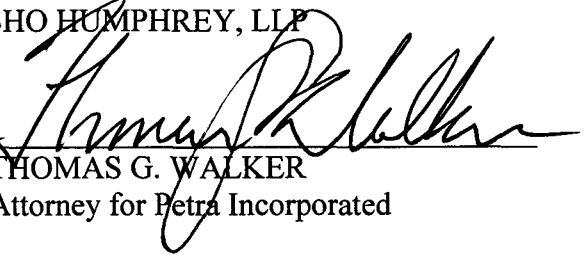
### 3. Conclusion

The City’s Motion to Dismiss lacks merit and should be denied. Petra’s original and amended counterclaim each sought relief in the form of consequential damages arising from lost profits and earnings. Petra filed each counterclaim within 180 days of accrual of its claim. The City has been on notice for over a year of Petra’s claims and the nature of its damages.

DATED: November 15, 2010

COSHO HUMPHREY, LLP

By:

  
THOMAS G. WALKER

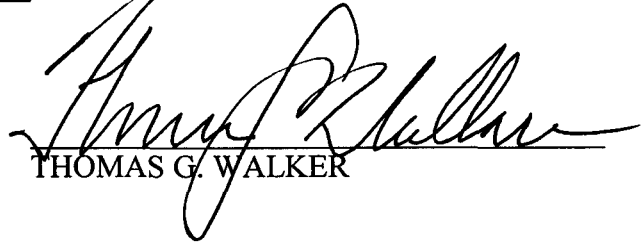
Attorney for Petra Incorporated

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15<sup>th</sup> day of November, 2010, a true and correct copy of the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Daniel Loras Glynn  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

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<input type="checkbox"/>	Hand Delivery
<input type="checkbox"/>	Overnight Courier
<input checked="" type="checkbox"/>	Facsimile: 331-1529
<input type="checkbox"/>	E-mail:

  
THOMAS G. WALKER





1. I am one of the attorneys of record for the Defendant/Counterclaimant, Petra Incorporated ("Petra"), in the above-entitled action and I make this affidavit based on my own personal knowledge of the facts set forth herein.

2. I submit this affidavit in support of Petra's Opposition to the City's Motion to Dismiss Defendant's Claim for Lost Profits and or Business Devastation Pursuant to the Idaho Tort Claims Act.

3. This discovery cutoff in this matter was September 29, 2010, making all responses and supplemental responses due no later than October 29, 2010.

4. On October 29, 2010, Defendant Petra Incorporated served its Supplemental Response dated October 29, 2010 to the City of Meridian's First Interrogatories and Requests for Production of Documents.

5. Attached as **Exhibit A** is a true, correct and complete copy of Petra Incorporated's Supplemental Response dated October 29, 2010.

6. A Notice of Service of Supplemental Discovery Response was filed with the Court on October 29, 2010. Attached as **Exhibit B** is a true, correct and complete copy of the Notice of Service with Court filing stamp.

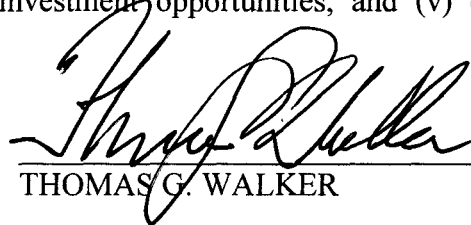
7. The facts recited in Plaintiff's most recent Motion to Dismiss do not accurately recite the facts.

8. In Petra's Counterclaim dated May 6, 2009, paragraph 98 states as follows:

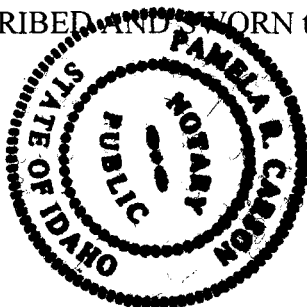
98. Damages suffered by Petra include compensatory damages, plus interest at the statutory rate of 12% as provided in Idaho Code §28-22-104(1), plus such additional amounts as are proved in these proceedings to put Petra in the same position it would have occupied had Meridian not breached. Such damages consist of, *inter alia*: (i) \$512,427 – the remaining amount owed by Meridian; (ii) lost past and future earnings and benefits Petra would have realized had Meridian not breached; (iii) lost business and investment opportunities, and (iv) other interest and finance charges.

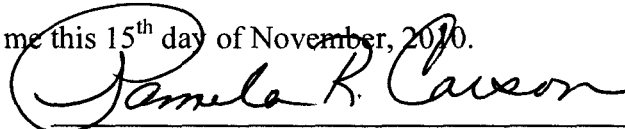
9. On August 21, 2009, Petra Incorporated filed its Answer and **First Amended Counterclaim**. In its First Amended Counterclaim at paragraph 99 Petra again alleges its damages claim as follows:

99. Damages suffered by Petra include compensatory damages, plus interest at the statutory rate of 12% as provided in Idaho Code §28-22-104(1), plus such additional amounts as are proved in these proceedings to put Petra in the same position it would have occupied had Meridian not breached. Such damages consist of, *inter alia*: (i) \$512,427 – the remaining amount owed by Meridian under Change Order #2; (ii) \$155,992.81 – the remaining amount owed by Meridian under the basic Agreement; (iii) lost past and future earnings and benefits Petra would have realized had Meridian not breached; (iv) lost business and investment opportunities, and (v) other interest and finance charges.

  
THOMAS G. WALKER

SUBSCRIBED AND SWORN to before me this 15<sup>th</sup> day of November, 2010.



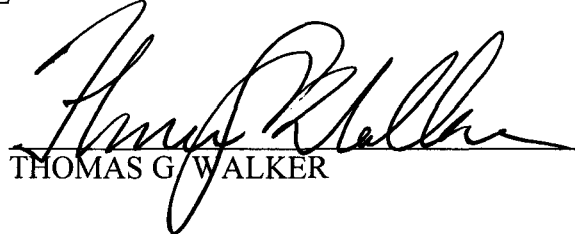
  
Notary Public for Idaho  
Residing at Eagle, Idaho  
My commission expires: March 31, 2016.

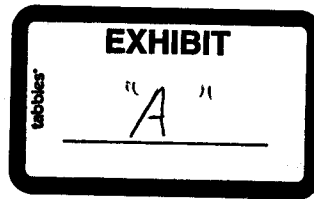
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15<sup>th</sup> day of November, 2010, a true and correct copy of  
the within and foregoing document was served upon:

Kim J. Trout, Esq.  
Daniel Loras Glynn  
Trout Jones Gledhill Fuhrman, P.A.  
225 North 9<sup>th</sup> Street, Suite 820  
P.O. Box 1097  
Boise, Idaho 83701

☐ U.S. Mail  
☐ Hand Delivery  
☐ Overnight Courier  
☒ Facsimile  
☐ E-mail:

  
THOMAS G. WALKER



Thomas G. Walker (ISB 1856)  
MacKenzie Whatcott (ISB 5509)  
COSHO HUMPHREY, LLP  
800 Park Blvd., Suite 790  
P. O. Box 9518  
Boise, Idaho 83707-9518  
Direct Phone: (208) 639-5607  
Cell Phone: (208) 869-1508  
Direct Facsimile: (208) 639-5609  
E-mail: twalker@cosholaw.com; mwhatcott@cosholaw.com

Attorneys for Defendant, Petra Incorporated

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

★ ★ ★ ★ ★

THE CITY OF MERIDIAN, an Idaho  
Municipal Corporation,

Plaintiff,

vs.

PETRA INCORPORATED, an Idaho  
corporation,

Defendant.

Case No. CV OC 0907257

**PETRA INCORPORATED'S  
SUPPLEMENTAL RESPONSE DATED  
OCTOBER 29, 2010 TO THE CITY OF  
MERIDIAN'S FIRST INTERROGATORIES  
AND REQUESTS FOR PRODUCTION OF  
DOCUMENTS**

Petra Incorporated ("Petra"), by and through its undersigned counsel, pursuant to Rules 33 and 34 of the Idaho Rules of Civil Procedure, supplements its response to Plaintiff City of Meridian's (Meridian) First Set of Interrogatories and Requests for Production of Documents, served on or about July 22, 2009 as follows:

**INTERROGATORY NO. 1:** Identify each and every person known to Petra who has information regarding anything having to do with (a) the Claims made Meridian, (b) the Defenses asserted by Petra, (c) the Claims made by Petra, and (d) the Defenses asserted by Meridian, whether oral, written or recorded; stating in complete detail as to each such person: (i) full name, home address, business address and telephone number; and (ii) substance of the information of which they may have knowledge.

**SUPPLEMENTAL RESPONSE:** The following persons are added to Petra's response:

47. Jack K. Lemley, Lemley International, 604 North 16<sup>th</sup> Street, Boise, Idaho 83702;
48. Richard Bauer, Lemley International, 604 North 16<sup>th</sup> Street, Boise, Idaho 83702;
49. Keith Pinkerton, Hooper Cornell, PLLC, 250 Bobwhite Court, Suite 300, Boise, Idaho 83706;
50. Dennis Reinstein, Hooper Cornell, PLLC, 250 Bobwhite Court, Suite 300, Boise, Idaho 83706;
51. Darrell Coleman, Alpha Masonry;
52. Tim McGourty, TMC Masonry Contractors;
53. Mike Miller, M.R. Miller;
54. Tom Zabala or other representative of ZGA Architects;
55. Glenn Hickey, Custom Precast;
56. Rob Drinkard, Western Roofing Contractors;

57. Jeff Brewer, Western Roofing Contractors;
58. Ted Davis, Western Roofing Contractors;
59. Jay Goodsen, Tri State Electric;
60. Randy Frisbee, Hobson Fabricating, Inc.
61. Ted Frisbee, Sr., Hobson Fabricating, Inc.
62. Ted Frisbee, Jr., Hobson Fabricating, Inc.
63. Pat Clover (Hobson Fabricating, Inc.)
64. Dell Hatch, Hatchmueller Landscape Architects;
65. Chuck Hurn, Heery International;
66. Troy Kunas, Heery International;
67. Lenny Buss, Buss Mechanical;
68. John Buss, Buss Mechanical
69. One or more representatives of Yamas (HVAC equipment);
70. One or more representatives of Versico (regarding roofing materials);
71. Sheldon Morgan, Custom Glass;
72. Randy Pierce, American Wall Covering;
73. Stewart Jensen, D&A Door;
74. Dave Cram, MTI

Mr. Lemley and Mr. Bauer are expected to testify consistent with their affidavit and deposition testimony given in this matter.